(25,982)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 517.

THE UNITED STATES OF AMERICA ON THE RELATION OF ALASKA SMOKELESS COAL COMPANY, PLAINTIFF IN ERROR,

vs.

FRANKLIN K. LANE, AS SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, AS COMMISSIONER OF THE GENERAL LAND OFFICE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia.

THE UNITED STATES OF AMERICA ex Rel. ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, et al.

a Supreme Court of the District of Columbia.

At Law. No. 59767.

THE UNITED STATES OF AMERICA, on the Relation of ALASKA SMOKELESS COAL COMPANY, Plaintiff and Relator,

vs.

FRANKLIN K. LANE, as the Secretary of the Interior, and CLAY Tallman, as the Commissioner of the General Land Office, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Petition for Writ of Mandamus.*

Filed November 29, 1916.

In the Supreme Court of the District of Columbia.

At Law. No. 59767.

THE UNITED STATES OF AMERICA, on the Relation of ALASKA SMOKELESS COAL COMPANY, Plaintiff and Relator,

vs.

FRANKLIN K. LANE, as the Secretary of the Interior, and CLAY Tallman, as the Commissioner of the General Land Office, Respondents.

Now comes Alaska Smokeless Coal Company, the relator, and petitions this Honorable Court to grant its writ of mandamus ad-

dressed to Franklin K. Lane, as the Secretary of the Department of the Interior, and to Clay Tallman, as the Commissioner of the General Land Office, of the United States, upon the facts set forth in this petition, commanding them to perform official acts to the effect prayed for herein, to-wit:—

I. Alaska Smokeless Coal Company, the relator, is a corporation organized and existing under the laws of the State of Washington, and located and having its office and principal place of business at Seattle, in King County, Washington, and it has been such corporation for more than seven years last past; and the respondent Franklin K. Lane is, and for more than three years last past has been, the Secretary of the Department of the Interior of the United States, and duly vested as such officer with all the rights, privileges, powers and jurisdiction by law created in that office; and the respondent

2 Clay Tallman is, and for more than three years last past has been, the Commissioner of the General Land Office in said Department and duly vested as such officer with all the rights, privileges, powers and jurisdiction by law created in that office.

II. There are, and from remote ages have been, sundry large and valuable mines and deposits of coal beneath the surface of certain unsurveyed public lands of the United States in that portion of the Territory or District of Alaska, which is known on the records of the Department of the Interior of the United States, as the Kayak Recording District in the Juneau Land District in said Alaska. Said lands are situated on, along and near Shepherd's Creek in the Bering Coal Field in said Kayak Recording District, and elsewhere in said Juneau Land District. In the months of July and August, 1904, upon and after independent and separate acts of exploration and prospecting, the individuals hereinafter named, severally and respectively, discovered and opened coal mines upon said lands, and thereupon, each, severally and respectively, located the lands where such explorations and discoveries were made, to-wit: the tract which he had explored and within which the coal mine or mines which he had discovered lie, as a Coal Claim under the then statutes of the United States in that behalf. Said explorations and discoveries were made, and said respective Coal Claims were located, named, marked and staked by the respective locators, as follows:

Aurora No. 1, by Elise Asbjornson, on July 9, 1904,
Aurora No. 2, by Torger A. Feed, on July 6, 1904,
Aurora No. 3, by Walfred Dahlgren, on July 9, 1904,
Aurora No. 4, by Albin Bredenberg, on July 9, 1904,
Aurora No. 5, by Fred Lind, on July 9, 1904,

3 Aurora No. 6, by Peter L. Peterson, on July 9, 1904,
Aurora No. 7, by Mrs. August Beck, on August, 1904,
Aurora No. 8, by Swan Swanson, on August 2, 1904.

On said respective dates each of said locators was, and long had been, a citizen and a resident of the United States, and was qualified to make entry under the coal land laws of the United States. Said Coal Claim Aurora No. 7, thereafter, and on or about July 1, 1905, was abandoned by said original locator, and thereafter the same was re-located, named, marked and staked, after exploration and pros-

pecting, by Ole M. Holck, on October 16, 1906, who was then a citizen and a resident of the United States, and qualified as aforesaid. Each of said Coal Claims was located and staked on unsurveyed public lands along or near Shepherd's Creek in the Bering Coal Field, in said Kayak Recording District, in a rectangular tract, containing not more than one hundred and sixty acres, with north and south boundaries run according to the true meridian, and its four corners were marked with permanent monuments, so that its boundaries could be readily and easily traced—all in pursuance of the Act of Congress, approved on April 28, 1904, being Chapter 1772 of the Public Acts of the Fifty-eighth Congress.

III. Notices of the discovery and opening of coal mines on said tracts, and of the location thereof, were posted on or about said dates of exploration and discovery, by the respective locators, on their respective Coal Claims or locations, and within the boundaries of each respective Coal Claim, and thereafter, pursuant to said Act of Congress, there was filed for record in said Kayak Recording
4 District, and with the register and the receiver of said Juneau Land District, a notice as to each respective Coal Claim, containing the name of its locator, the date of its location, the description of the lands located and a reference to such natural objects or permanent monuments as will readily identify the same.

Such notice as to Aurora No. 1 was filed for record in said Recording District on September 10, 1904, and with said register and said receiver, on August 1, 1905;

Such notice as to Aurora No. 2 was filed for record in said Recording District on September 10, 1904, and with said register and said receiver on June 10, 1905;

Such notice as to Aurora No. 3 was filed for record in said Recording District on September 11, 1904, and with said register and said receiver on August 1, 1905;

Such notice as to Aurora No. 4 was filed for record in said Recording District on September 15, 1904, and with said register and said receiver on July 17, 1905;

Such notice as to Aurora No. 5 was filed for record in said Recording District on September 10, 1904, and with said register and said receiver on August 8, 1905;

Such notice as to Aurora No. 6 was filed for record in said Recording District on August 22, 1904, and with said register and said receiver on August 8, 1905;

Such notice as to Aurora No. 7, upon its re-location by said Holck, was filed for record in said Recording District on March 9, 1907, and with said register and said receiver on March 21, 1907;

Such notice as to Aurora No. 8 was filed for record in said Recording District on September 10, 1904, and with said register
5 and said receiver on July 17, 1905.

IV. Pursuant to the statutes of the United States in that behalf, each of said locators, severally, respectively, and independently of the others, upon the Coal Claim by him so located, on and after the date of his said location, did in good faith, open the Coal Mine or Mines then existing in and under the surface of the

land within the boundaries of his said location, and thereby made known to the public, to the United States and its officials in charge of its interests in that behalf, and to all whom it might concern, the existence of coal mines beneath the surface of the land so explored, selected, located, named, marked and staked by him—all in obedience to the laws of the United States, and to its policy as embodied in its statutes, and to the rulings and decisions of its courts, and to the rules, regulations, rulings and decisions of its officials charged with the duty of administration of its land laws. In consequence of said explorations, and of the discoveries of coal therein, and of independent explorations, surveys and discoveries made by and under the direction of that branch or subdivision of said Interior Department which is known as the Geological Survey, said tracts were classified by said Survey and by the officials of the United States who were charged with the duty of administering its laws pertaining to public lands in said District of Alaska as coal lands, and as more valuable for their deposits and mines of coal therein than for any other purpose, and as lying within, and being a part of, a well-defined carboniferous region which said Survey named the Bering Coal Field, and said tracts were so entered in the records and made known to the public in the publications
6 of the United States, and thereby said several tracts became known coal lands, having within and under them, respectively, coal mines, and the rights of said respective locators therein became fixed and vested.

V. Thereafter, at said Seattle, said several and respective Coal Claims, and all the rights therein acquired by their locators respectively, were sold and conveyed by said locators by deeds in due form, duly executed, witnessed and acknowledged, as follows:

Aurora No. 1 on July 1, 1908, by Elise Asbjornsen to F. L. Summers;

Aurora No. 2 on Oct. 20, 1908, by Torger A. Feed, under the name of Torger Asbjornsen to Henry Abeles;

Aurora No. 3 on June 30, 1908, by Walfred Dahlgren to S. R. Miller;

Aurora No. 4 on May 12, 1908, by Albin Bredenberg to C. B. Clark;

Aurora No. 5 on May 26, 1908, by Fred Lind to Thomas McGirl;

Aurora No. 6 on May 26, 1908, by Peter L. Peterson to Dalon F. Slayton;

Aurora No. 7 on May 26, 1908, by Ole M. Holck, to Mary A. Slayton;

Aurora No. 8 on May 26, 1908, by Swan Swanson to Frances A. Harney.

In the interval between said dates of location and of sale of said Aurora No. 2 Coal Claim, the name of said Torger A. Feed was duly changed to Torger Asbjornsen by order and decree of a court having jurisdiction of the subject matter and of his person.
7 Each of said grantees was then, and ever since then has been, a citizen and a resident of the United States, duly

qualified to make entry and to acquire and own coal lands and coal mines under the laws of the United States.

VI. On February 20, 1909, at the City of Seattle, Washington, pursuant to the statutes of the State of Washington for the incorporation of business corporations, the relator was duly incorporated as a domestic corporation of said State, located and having its office and principal place of business in the City of Seattle therein, and by the terms of its articles of incorporation duly filed and recorded in public offices, and by virtue of the statutes of said State in that behalf, the relator was empowered to acquire, own, sell, develop and operate coal lands and coal mines therein, in the District of Alaska and elsewhere in the United States, and thereby became vested with the franchise so to do during its corporate life, which is for the period of fifty years from said date, and ever since then the relator has owned and maintained said franchise, and has duly paid all corporate license fees and taxes by law imposed on it. Upon its incorporation, the entire capital stock of the relator was subscribed, so that it became qualified to engage in business within its corporate powers, and a board of trustees or directors, and officers, as provided in the articles of incorporation and the by-laws, were duly elected, and all said offices have been duly and continuously filled thence hitherto—all according to the statutes of said state in that behalf; and seventy-five per centum of its capital stock is, and always has been, held and owned by persons who were, and are, qualified to enter and to own coal lands in Alaska.

8 VII. On sundry dates after its incorporation, the relator, at said Seattle, purchased from said grantees of the locators, their respective coal claims as follows: On March 31, 1909, from F. L. Summers, Aurora No. 1 coal claim; on March 24, 1909, from Henry Abeles, Aurora No. 2 coal claim; on March 15, 1909, from S. R. Miller, Aurora No. 3 coal claim; on March 15, 1909, from C. B. Clark, Aurora No. 4 coal claim; on March 15, 1909, from Thomas McGirl, Aurora No. 5 coal claim; on March 27, 1909, from Dalon F. Slayton, Aurora No. 6 coal claim; on March 27, 1909, from Mary A. Slayton, Aurora No. 7 coal claim; on March 27, 1909, from Frances A. Harney, Aurora No. 8 coal claim; all of which claims were on said respective dates duly and in writing, conveyed to the relator by deeds of their respective owners; which were duly executed, witnessed and acknowledged; and thereby the relator became vested with all the rights and titles of the respective locators and of their assigns and grantees therein.

VIII. Upon the application of the relator, said coal claims were duly surveyed on and between September 29, 1907 and October 31, 1907, and such surveys were duly reported and plats thereof made by Henry S. Waterman, a qualified United States deputy

9 Surveyor, designated therefor by the Surveyor General of the District of Alaska, who was by law authorized so to do; and the areas thereof, as shown by said surveys are as follows:

Aurora No. 1 by	Survey No.	295,	contains	117.731	acres
Aurora No. 2 by	" "	297	"	159.920	"
Aurora No. 3 by	" "	296	"	117.611	"
Aurora No. 4 by	" "	298	"	56.371	"
Aurora No. 5 by	" "	293	"	154.000	"
Aurora No. 6 by	" "	294	"	117.821	"
Aurora No. 7 by	" "	311	"	133.560	"
Aurora No. 8 by	" "	299	"	133.560	"
Being of a total area of				990.574	"

Thereupon, on April 23, 24, 25 and 29, 1908, at Juneau, Alaska, all said surveys of said eight coal claims were duly examined, approved and filed in this office by said Surveyor General, thereto duly authorized, and he duly, in writing, certified upon the plat of each of said eight coal claims that the original field notes of the survey of such respective coal claim, situate on unsurveyed public land in the Kayak Recording District, in the District of Alaska, and designated by him as U. S. Coal Land Survey numbered as above set forth, had been examined and approved and were then on file in his office, and that such notes furnish such an accurate description of such respective coal claim as will, if incorporated into a patent, serve fully to identify the premises, and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the locus thereof; and he further certified upon each respective plat that the same was a correct plat of the coal claim which it purported to represent, made in conformity with its original field notes, and that it was by him approved. All of said surveys, field notes and plats still remain on file in said office. Each of said coal claims as so surveyed and platted, is a rectangular tract of the acreage aforesaid, with its north and south boundaries run according to the true meridian and its four corners are marked with permanent monuments; and in said respects and all other respects, said locators, their grantees and the relator have complied with the laws of the United States and the rules, regulations and instructions of its Interior Department, from time to time in force as to the location, survey and acquisition of coal lands in Alaska.

IX. As shown by said surveys, field notes and plats, and as the fact is, said eight coal claims were, and are, contiguous one with another and they all together constitute one tract of contiguous lands, which does not exceed in its total area two thousand five hundred and sixty acres, and does not exceed in its total length twice its greatest width; and for the purpose of consolidating their said coal claims by including them in a single claim, location and purchase, and of acquiring the title in fee to all thereof as a so-called consolidated coal claim, pursuant to the Act of Congress approved on May 28, 1908, being Chapter 211 of the Public Acts of the Sixtieth Congress, said grantees of said locators, after their said purchases thereof, formed a corporation, which is the relator, as aforesaid, and for valuable considerations to them respectively moving from the relator they respectively conveyed to it their said eight coal claims, as aforesaid,

and thereby consolidated them into a single claim or location of contiguous coal lands, which complies in dimensions and form
11 with said Act of Congress. Thereupon, at the City of Juneau, in the District of Alaska, on June 30, 1909, the relator paid to the Treasurer of the United States, ten dollars for each acre of said coal claims as surveyed, being in the aggregate the sum of $9,905.74, and then and there made due application to the then Secretary of the Interior through the register and the receiver of the Juneau Land District that he issue or direct the issue to the relator of a patent of the United States, granting to it in fee simple said lands contained in said eight coal claims as a consolidated coal claim, under said Acts of Congress of 1904 and 1908; and the relator then and there with its application, tendered to the then Secretary of the Interior, due proof of its compliance with said statutes and with the regulations of the Department of the Interior concerning coal claims upon unsurveyed public lands in Alaska and the grant and issue of patents therefor; and the relator's said application was thereupon filed in the Land Office of the Juneau Land District, and due report of said application was made to, and filed in, the Interior Department at said City of Washington. Notice of said application was duly posted and published, according to law, for a period of sixty days, beginning on August 14, 1909; and said application thereafter was taken under consideration and the facts concerning it were investigated by the officials of the Interior Department who are charged with the duty of investigating applications for patents of public lands.

X. Upon and after such investigation, and in consequence of the supposed discovery of alleged or assumed violations of the laws of the United States and the regulations of the Interior De-
12 partment concerning the location and acquisition of coal lands in Alaska, on or about April 26, 1912, at said Juneau, and under the direction of said Commissioner of the General Land Office of the Interior Department, proceedings were instituted in the General Land Office against said application and against said locators, designated as "claimants," and the relator as applicant for a patent of said consolidated coal claim, on the following charges, filed by a special agent of the General Land Office:

1. That the claimants did not make their respective locations and filings for their own exclusive, individual use and benefit, but that each and every one of them, prior to making said locations and filings, on and for the lands involved, entered into an agreement or understanding with one Torger A. Feed, now Torger Asbjornson, whereby it was agreed and understood that the said Torger A. Feed, now Torger Asbjornson should receive a certain interest in the said location and filings, whereby said Torger A. Feed, now Torger Asbjornson, should receive a certain interest in the said location and filings, whereby said Torger A. Feed, now Torger Asbjornson, should receive and enjoy the benefits of a greater number of locations and entries of coal lands and of a greater quantity of said lands than allowed by law.

2. That the claimants did not locate and file upon the lands em-

braced in and covered by their respective filings in good faith and with intent that the legal title to the land covered by each of the several filings should be acquired pursuant to the laws of the United States governing the entry, sale or disposition of public lands valuable for the coal deposits contained therein for the separate and several use and benefit of the individual claimants, but each of said locations and filings was made pursuant to an unlawful agreement and understanding entered into by each and every one of said
13 claimants with one Torger A. Feed, now Torger Asbjornson, whereby the said entries and locations were to be made in the interests in whole or in part, of and for the benefit of Torger A. Feed, now Torger Asbjornson, and various and several other persons or corporations who are to the General Land Office unknown and therefore cannot be alleged.

3. That the said claimants did not locate and file upon the lands embraced in and covered by their several filings in good faith with intent that the legal title to the lands covered by each of the several filings should be acquired pursuant to the laws of the United States governing the entry, sale, or disposition of public lands valuable for the coal deposits contained therein for the separate and several use and benefit of the individual claimants, but each of said locations and filings was made pursuant to the unlawful purpose and intent that the title acquired thereby and thereunder might and should inure to the use and benefit in equal measure of the entrymen and to each and every one of the several other persons by whom said declaratory statements mentioned above were made or to the use and benefit of an association or corporation by them formed or entered into or contemplated and of which they were to be the members and stockholders by themselves or in association with such other persons as they might admit or who might secure entrance therein.

4. That the above locators and claimants of the several tracts and parcels of land covered by and embraced within the above mentioned coal declaratory statements did not, they nor any of them prior to making such locations or at any time thereafter and prior to filing notices of said location open or improve any mine or mines of
14 coal on any of said tracts of land, as required by the act of April 28, 1904 (33 Stat., 525).

XI. By reason of such proceedings, charges and contest in behalf of the United States against the rights of the relator in the premises, and pursuant to the practice of the General Land Office, voluminous testimony was given, orally and in writing, under oath by numerous witnesses and in sundry places in the United States, and Alaska, as well in behalf of the United States and of the General Land Office, representing the rights and interests of the Government and the people of the United States, as in behalf of the relator which had succeeded as aforesaid to all the rights of the locators, and because thereof none of the locators appeared or took any part in said proceedings except as witnesses summoned to testify in support of said application; and after completing the taking of all testimony and the production of all evidence which either the United States, represented by the special agents of the General Land Office, or the

relator as grantee of the locators desired to take or to produce the hearing thereof before the register and the receiver of the Juneau Land District was brought on in due course at said Juneau on April 25, 1914, and was argued by counsel in behalf of both said parties, and thereupon said register and said receiver, on June 15, 1914, rendered their decision, whereby they held that the United States, designated in their decision under the name of "the Government", had failed to sustain charges numbered 2 and 3, as above set forth, as to any of said eight Coal Claims; that charge numbered 1, as above set forth, was sustained only as to the Coal Claim named and
15 numbered Aurora No. 7; and that no mine or mines of coal within the meaning of the Alaska coal land was, had been opened or improved upon any of the claims included in said application at the date of the alleged location thereof or at the time of filing the notices of the alleged location, and hence that charge numbered 4, as above set forth, had been sustained as to all of said eight Coal Claims; and therefore and thereupon and only for the reasons that said charge numbered 1 had been sustained as to said Aurora No. 7 Coal Claim only and said charge numbered 4 had been sustained as to all said Coal Claims Aurora Nos. 1 to 8 inclusive, said register and said receiver concurrently decided and recommended that said application for a patent upon said consolidated Coal Claim, embracing said eight individual Coal Claims be rejected. Said decision of said register and said receiver was certified by them to the respondent Tallman, and was placed and still remains on the files of the General Land Office, and the relator is ready to produce a certified copy of the whole thereof as and when the Court shall direct, but inasmuch as said charge numbered 1 was sustained only as to said Aurora No. 7 Coal Claim, which was subsequently abandoned and application for the repayment of said deposit money for a patent thereof was subsequently made by the relator, as hereinafter alleged, and said charges numbered 2 and 3 were so decided not to have been sustained by the United States as complainant in said charges, the relator omits herein all those portions of said decision which pertain to said charges numbered 1, 2 and 3, and here sets forth and submits to this honorable court a complete transcript of the whole of those portions of said decision which pertain to said charge numbered 4, and which after setting forth and decision of said register and said receiver upon
16 said charges numbered 1, 2 and 3, adversely to the United States—(except as to said Coal Claim Aurora No. 7), and their reasons therefor, proceeds as follows concerning said charge numbered 4, to-wit:

There is a duty imposed upon the Government to show that the charges are true by clear and convincing evidence, and in this in our judgment the Government has failed to support charges 1, 2 and 3, against all of the claims excepting that of Holck. As to the Holck claim it has failed to support charges 2 and 3 but has proved charge 1.

The group of eight claims lies on the north side of Shepard Creek, a tributary of Canyon Creek. To the east of the group lies Lake

Charlotte, the objective point of a surveyed route for a railroad which crosses the south eastern portion of the Aurora No. 5 claim. The land rises from a few hundred feet elevation at Shepard Creek to an elevation of 1,500 feet in the norther-most past of the group and the slope is to the south west and south east. Two main streams traverse the claims on the south west and south east and to these streams smaller streams are tributary through gulches that make the surface rugged.

Nearly all of the Aurora No. 3 and Aurora No. 7 and part of the Aurora No. 8 are within the area of the Tokum or non-coal bearing area. The Kushtaka or coal bearing formation covers part of the Aurora No. 4, No. 2, No. 5, nearly all of the Aurora No. 6 and No. 1 and the southeastern portion of the Aurora No. 8.

At the time of the examination of the ground by George Kennedy, a Government witness and coal expert, he noted over twenty open cuts or trenches or pits scattered throughout the group of
17 claims, but on the Aurora No. 3, No. 7 and No. 8 he was not able to find any workings. The time spent by him upon the group was about one week in 1911, and the examination was confined chiefly to the gulches and draws, and he states that there might have been many more openings not discovered by him. In addition to the workings noted by him he found also forty or fifty coal exposures. On the Aurora No. 3 and No. 7 he found neither workings nor exposures and on the Aurora No. 8 only exposures in the southeastern part of the claim.

Andrew Kennedy, also a coal expert, witness for the defense, formerly in 1909 employed by the Government generally to examine the Bering River Field, made an examination of the group for the applicants in 1911. He found many more exposures and workings not found by Mr. George A. Kennedy. His examination covered a period of about three days.

George Kennedy testifies that the openings consisted of trenches two to four feet deep extending up to a length of ten feet into the side of the hill, and that these open cuts demonstrated the veins only as far as the trench exposed the same; that the continuity of the vein beyond the limits of the trench could not be determined and that the continuity of the formation was very much interrupted by the folding of the strata; that the varying dip of the coal veins and strike of the formation indicated an extreme want of continuity of different seams and strata.

Andrew Kennedy, however, insisted that there is a general formation noticeable throughout the entire district, and that the disturbances mentioned are only local.

George A. Kennedy admitted that workable veins were to be found on the Aurora No. 2 and No. 4, doubting, however,
18 the workability of veins on Aurora No. 1. The strike of the formation is Northeast and southwest and the dip 25° to 50° to the northwest carrying those veins uncovered, if continuous, under the claims covered by the Tokum formation.

T. P. McDonald, also a witness for the defense and a coal expert, testified that in 1906 when he examined the claims, there were

open cuts averaging perhaps three to four feet wide running across the vein, some only a few feet and some ten, fifteen and twenty feet long, and many had been run ten or fifteen feet into the coal.

In 1907, McDonald instructed his brother, G. F. McDonald to go upon the land and examine the coal deposits with a view to determining the continuity of the veins. McDonald with one man spent about three weeks on the ground, cleaning out the old openings and making new ones, the result satisfying McDonald that the veins were continuous. This appears to be the last work done upon the claims. This office is of the opinion that the claims, all of them, are properly classed as coal land.

There is little testimony by the original locators that definitely shows the amount of work done by them, or the expense thereof, excepting that it is clear that some more prospecting work was done at the time of the staking of the claims and that two weeks further "prospecting" work by two men, Asbjornsen and Beck, thereafter in the summer of 1904 was done. The value of this work is recited in four of the declaratory statements to be $10.50 and it is considered that no more work on the other claims in value was done.

The following openings appear to have been made on the several claims as they are mentioned, in 1904, made generally by
19 Beck and Asbjornsen:

Aurora No. 1. Several places near the west line opened so that the vein was exposed, the vein being three or four feet thick.

Aurora No. 2. A vein six or seven feet thick dug into so that the vein was exposed, from which according to Asbjornsen, coal could have been mined. The witnesses unite in asserting that the coal on this claim is of commercial value.

Aurora No. 3. A three foot vein of coal well to the north on the west line, three feet thick. Openings to the east of the east line and to the south of the south line at southeast corner showing veins that probably dip into the claim. The southeast corner only of the claim shows the coal bearing formation.

Aurora No. 4. Veins showing coal about three feet thick near the center of the claim opened up in two different places. The coal was dug across the face. Other openings on this claim, by whom made not certain, show veins 9, 10, 10½ and 15 feet.

Aurora No. 5. A vein four or five feet thick was opened containing good coal which could have been mined out of the opening made, according to Asbjornsen. On this claim two large workable veins were found in 1906 by T. P. McDonald. Witness G. A. Kennedy found four workable veins.

20 Aurora No. 6. A vein of three to four feet was opened up from which coal could have been taken out. In 1906 T. P. McDonald saw four openings on this claim showing coal five and six feet thick. Witness G. A. Kennedy testified that one of these veins was a valuable vein.

Aurora No. 7. This claim the Beck and Holck claim shows no work done.

Aurora No. 8. A vein opened showing coal three or four feet thick.

This work is generally described prospect work or assessment work and the intent of the locator therein appears as follows:

Regarding his claim and the intent at the time of the location, Bredenberg states:

"Why, I expected to work it, and if I could not work it I would sell it."

Regarding Asbjornsen, Dahlgren and himself, he states,

"Well, we intended to work it and sell it."

Asbjornsen when questioned whether he located his claim to sell it, stated,

"Well, most anybody probably would sell if they had a chance * * * I didn't think much about it at the time."

Swanson testified:

"Well, I expected to work it if I could, and I thought I
21 could do some prospecting there, that maybe I could sell it for a good price."

Dahlgren expected to develop his claim by doing "assessment" work and that when he secured title to it he could make some money out of it by selling the claim. He would mine the coal enough to pay the expense of doing the assessment work—to hold the claim until he got title.

Neither Elise Asbjornsen nor Peterson, in the affidavits admitted as their testimony, give an expression of their intent at the time of the location, although Elise Asbjornsen states that she never expected to get patent for the claim and that she expected Asbjornsen would sell the claim for her.

None of the locators express more than a conditional purpose to mine the coal, dependent upon their ability—which none of them possessed—to develop a paying mine. If there was an intent to mine the coal or to open a mine it was so mingled with the purpose to prospect and do the other necessary work in its preliminary stages and with the intent to sell the claims if they could not be mined, and so little work was done in the two years prior to the giving of the option, when, whatever intent existed, was quickly abandoned, that the attending facts and circumstances in this case do not afford the assistance in determining the question whether a mine has been opened or improved on the several claims, that the rule hereinafter stated might otherwise permit.

The qualification of the locators in this matter is determined under the following rules or requirements gathered from the decisions:

1. The opening must be more than a mere exposure or scratching of the surface or vein. It must be a pit or open cut or worked
22 vein—a requirement set forth in the case of the United States vs. Schofield. (41 L. D. 176.)

2. What pit, open cut or worked vein constitutes a mine opened or improved cannot be determined by any general rule. Each case must be considered in the light of those peculiar facts and circumstances attending it. Esther F. Filer (36 L. D. 360).

3. The work done must not be a matter of form—a requirement that the claimant shall have acted in good faith. Coal land circular of May 3, 1882. Circular of April 12, 1907. If the work done, of

itself, appears to be a matter of form, the good faith of the claimant may be investigated by considering the degree and condition of life of the claimant—his ability to do more or less than the amount of the work shown. Watkins vs. Garner (13 L. D. 414).

4. The work done must be potentially at least, capable of becoming part of the operative plan of mining coal, part of the actual work of the mine operating, and substantial—rules modified in each case by the observance of the rules already stated—and the intent at the time of the qualification must not be a speculative intent, i. e., merely to prospect the claim. It must be an intent justified by the facts disclosed to the miner, to open or improve a mine. Esther F. Filer (36 L. D. 360) Andrew L. Schofield et al. (41 L. D. 176) James Wardell, unreported, July 23, 1913.

There is no serious doubt but that on all of the claims excepting the Aurora No. 7, pits or open cuts or veins that in some measures could be worked, perhaps at a loss, are to be found.

The defense has sought to show that prior to the location
23 of these claims the qualification of the locator in opening or improving a coal mine is not the qualification now required of the same locator and has appealed to the rule to abide by the cases formerly adjudicated.

The liberal spirit of the requirements of the Department under the General Coal Land Laws comes of what may be termed a policy, to permit the man of small means as well as the man of better circumstances, to become a beneficiary thereunder and is due also to the fact that the opening and improving of a coal mine under the general law secures only a preference right, a right of entry yet remaining under Section 2347.

Under this policy and because of the presence of Section 2347 in the general law, good faith and the large play of this qualification of the locator has become almost a controlling force in the adjudicated cases, which often show improvements no greater in extent and value than appear in this case and of like character. The qualifications given in rule three in the foregoing, have been developed not only from a construction of the statute but also from the effort of the adjudicating officer to determine whether the "labor expended and improvements made" are "such as to clearly indicate the good faith of the claimant." Under the 1904 act there is not the assistance derived from Section 2347 permitting a larger controlling influence of the good faith as it appears in the improvements themselves. There is not then, such a common statutory intent expressed in the general law and the Act of 1904 as will permit an adjudication under the rule of stare decisis even if it be conclusively shown that the qualification formerly defined is not what is now
24 sought to be exacted of the locator.

The absence of any well expressed intent to mine the coal, the intent, such as it appears, to prospect the claims rather than to develop paying mines, the failure to show clearly in the labor expended and improvements made a qualifying intent, or to show that such work or improvements was potentially capable of becoming part of the operating plan of a producing mine and that the

steps therein taken were substantial and looked to the creation of an operating and producing mine are all matters of evidence submitted which sustain charge four, as to all of the claims.

It is accordingly recommended that the application be rejected and the locations be declared invalid.

XII. The relator and said locators, conceiving themselves to be aggrieved under the forms of law without just cause by said decision of the local officers of the Juneau Land District, thereupon, on July 2, 1914, an appeal to the respondent Tallman as the Commissioner of the General Land Office, was taken by, and in the names of, the relator and of all said locators hereinabove named, from that part of said decision which found and held that said charge numbered 1 had been sustained as to the Aurora No. 7 Coal Claim only, and said charge numbered 4 had been sustained as to all said Coal Claims; and due notice of such appeal was filed in the office of the Juneau Land District and in the General Land Office in the City of Washington, and was served upon said local officers and said Commissioner, all according to the law and the practice of the General Land Office and of the Interior Department in that behalf.

25 No appeal was taken by or in behalf of the United States, or of "the Government" thereof, from that part of said decision of said register and said receiver, which held in favor of the relator and of said locators upon said charge numbered 1 except as to the Aurora No. 7 Coal Claim, and upon said charges numbered 2 and 3 as to all said Coal Claims, and, as the relator is advised and believes, said decision as to said three charges became and remains conclusive against the United States and a bar as between the parties herein to any further controversy or issue of law or of fact within the scope of said three charges. Thereafter, said appeal came on for hearing and argument before the respondent Tallman as such Commissioner upon the same evidence submitted to said register and said receiver, and on none other evidence, and was argued on written briefs by counsel for each party and after such hearing and argument, on June 7, 1915, the decision appealed from was affirmed as to said charges numbered 1 and 4 by the respondent as such Commissioner, and said consolidated Coal Claim and all said individual Coal Claims embraced therein were held by him for rejection, upon the ground stated in said charge numbered 4, and he ordered the application for a patent thereon to be rejected for that cause only, and such order was duly entered on the records of the General Land Office. Said decision and order, as so entered and recorded, remains on file and of record in said Office, and the relator is ready to produce a certified copy thereof as and when the court shall direct, and it now here submits to this honorable court a transcript of the whole thereof, except said charges numbered 1, 2, 3, 4 heretofore set forth verbatim, which were copied therein, as follows:

26 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON.

UNITED STATES

v.

ALASKA SMOKELESS COAL COMPANY et al.

Alaska Coal Claims,—Feed Group, Bering River District.

Application Rejected.

Register and Receiver, Juneau, Alaska.

SIRS: On June 30, 1909, the Alaska Smokeless Coal Company filed in your office its application, under the acts of April 28, 1904, and May 28, 1908, for the following consolidated coal claims:

C. D. S. No. 117, filed July 17, 1905, by Albin Bredenberg, for the Aurora No. 4 coal claim, located July 9, 1904.

C. D. S. No. 118, filed July 17, 1905, by Torger A. Feed, for the Aurora No. 2 coal claim, located July 9, 1904.

C. D. S. No. 119, filed July 17, 1905, by Swen Swanson, for the Aurora No. 8 coal claim, located July 9, 1904.

C. D. S. No. 120, filed August 1, 1905, by Walfred Dahlgren, for the Aurora No. 3 coal claim, located July 9, 1904.

C. D. S. No. 121, filed August 1, 1905, by Elise Asbjornsen, for the Aurora No. 1 coal claim, located July 9, 1904.

C. D. S. No. 122, filed August 8, 1905, by Fred Lind, for the Aurora No. 5 coal claim, located July 9, 1904.

C. D. S. No. 123, filed August 8, 1905, by Peter L. Peterson, for the Aurora No. 6 coal claim, located July 9, 1904.

27 C. D. S. No. 507, filed March 21, 1907, by Ole M. Holck, for the Aurora No. 7 coal claim, located October 16, 1906.

It appears that Torger A. Feed (now Torger Asbjornson) was attorney in fact or agent before your office in all of the above claims.

The applicant herein, the Alaska Smokeless Coal Company, in its application for patent, alleges an expenditure on the claims of a total of $3,444.76, of which amount the sum of $244.94 is charged to "developing and opening coal veins."

On April 26, 1912, your office issued notices under authority of office letter of March 25, 1912, upon the following charges against said claims:

(Omitted, as above-stated.)

On October 19, 1912, notice of hearing herein was issued setting final hearing before you February 23, 1913, which date was changed by stipulation to April 25, 1914.

Testimony was submitted by means of depositions on interrogatories and orally, taken in different states.

The affidavits of claimants Peterson and Elise Asbjornson taken by a special agent, were admitted by stipulation, as the testimony of the said claimants.

Claimants Torger Asbjornson, Bredenberg and Dahlgren appeared as witnesses for the defendants, and claimants Swanson and Holck were sworn as witnesses for the Government.

The record is voluminous and your office considered and set out at length the evidence and your views and conclusions thereon,
28 in your joint decision of June 15, 1914, found in favor of the defendants except Holck on the first, second and third charges and sustained charge one as to Holck and found in favor of the Government as to all claims on charge four, and recommended that the application be rejected and the locations be declared invalid. From which decision an appeal has been duly filed and briefs submitted by both sides.

In the notice of locations or coal declaratory statements filed by the several claimants in your office, an expenditure of $10.50 is alleged.

Upon a petition filed, and a court's order, Torger A. Feed's name was changed to Torger Asbjornson in May, 1907.

Elise Asbjornson is the divorced wife of the claimant, Torger Asbjornson.

It seems that all of the locators or claimants are Swedes or Danes and naturalized citizens of the United States and while some of them, Asbjornson, Peterson and Swanson, have been in this country since about the 80's, yet it appears that at the time the special agent, in 1908 and 1909, took the affidavits, the basis of the charges herein, the claimants did not thoroughly speak or understand the English language and there is very little doubt that a court would have allowed an interpreter if the claimants' rights were being passed upon and adjudged therein. The special agent does not claim to know their language and it does not appear that an interpreter was employed either at the trial or at the taking of the affidavits and your office in considering that matter found that:

"Because of the inability of a number of the witnesses to clearly understand the English language, the record does not always
29 show in our belief, a clear statement of the facts so far as the witnesses may have been able to give them in their own language." This conclusion appears clearly justified and such fact should be given considerable weight in considering the Government's fraud charge and the evidence in support thereof, especially relating to the statement or clause inserted in the affidavits by the special agent reading as follows:

"The understanding we had at the time we made the locations was that we would group all the above claims in one body and develop them ourselves, if we were able, and if we were not able to develop them we were to sell them all in one body, but there was not agreement with any company or any one else to sell to them," and which constitutes the gravamen of the fraud charges.

The eight claims involved herein are situate in the Bering River coal field, and lie on the north side of Shepard Creek, west of Lake Charlotte, the objective point of a surveyed route for a proposed railroad which crosses the southeastern portion of the Aurora No. 5 claim.

The Stracey group lie to the east and the Christopher group to the southwest.

Torger A. Feed, or Torger Asbjornson as he is now known, was a resident of Minnesota in the early 80's and went to Alaska in the year 1898. In 1902, he was divorced by his wife Elise Asbjornson, who it seems remained in the East.

At the time of the location of the claims involved herein, he was keeping a hotel at Katalla, Alaska, and it was at this hotel that the three claimants, Asbjornson, Dahlgren and Bredenberg, met in the spring of 1904, and understanding that there was some coal
30 land at Lake Charlotte still open to location and that there was some probability of a railroad being built there, Asbjornson as the leader or moving spirit, accompanied by Dahlgren and Bredenberg, started for that locality to find vacant coal land and locate same. It does not appear that there was any considerable discussion over or plans laid for the trip and no evidence whatever that they had been seen or communicated with by any corporation or person or the agent of same in regard to same. As to the trip and the incidents leading up to same, Asbjornson testified:

"Well, I came to Katalla in 1903, in August, I think, and worked around there for a while and then I was sent to Cunningham's group and worked there about three months, I think it was, and I stayed in Katalla during that winter and the spring of 1904 I was there and I thought if there was any coal open I ought to get a claim myself, so I went up and went over there with Bredenberg and Dahlgren. We went in a dory from Katalla, around Strawberry Bar and up the river to Bering Lake and we stayed at the cabin over there, west of Polles Point—there was an old cabin there. I knew that Mr. Thurston was up there and he was acquainted with the coal field there and I wasn't on that side of it, and so I went up to him and told him that we were up here and wanted to get a coal claim, if there was any, and I asked him if he could direct me to some vacant ground north of, and adjoining, the English Company's ground. We left him and proceeded up to Carbon Camp, where the English Company's camp for the coal field was located. I went in to the foreman and told him that we were looking for some coal land and if he would be so kind as to tell us the line of the English Company's ground, and he told me the line was blazed. We
31 went up there and pitched our tent that day, toward evening, and this was on the east side of Lake Charlotte. We prospected there a couple of days and found no coal so we pulled up our camp and went back and across Shepard Creek, on the west side of the valley. We camped there and the next day we divided, I think into three different directions, one here and one there, for three of us to prospect for coal and we were to meet again some place further up. We met up there and each fellow had discovered coal in different directions. We found the section line or post down close to Shepard Creek. After that we were looking to see if we could find any more. It looked so it might be located by some other party and we could not find any more at that time—we went in different directions and at this time we found some croppings of coal; at the same

time we satisfied ourselves that the land might be open, so we started to locate on the southwest corner of Aurora No. 2—the northeast corner."

As to what was done in the way of opening or improving a coal mine or mines after the said claimants reached the land on the first trip, and also on the return to the land by Asbjornson with Beck and Bredenberg, and also as to the further work claimed to have been done for the benefit of the claimants or their assignees, it appears from Asbjornson's own testimony that nothing more than prospecting to find and expose the veins of coal so as to determine the fact that coal was there and that it could be mined if there was demand and sale for it was done.

He says in answer to his counsel's questions as what was done on the first visit besides surveying and locating the respective claims:

32 Q. Had you found a vein of coal on each of the claims prior to this time? A. Prior to this time, when we put notices in on Swanson's claim we saw a slide, a little north; there was a meadow there and there was a slide, and there was coal there, not far from the corner—this other we had been over before when we were looking for some location tests and prospecting at the same time.

Q. And had you opened up the coal on each of those claims? A. Well, there was croppings but hadn't yet any opening at that time.

Q. Did you uncover the croppings so you could see the extent of the vein? A. Not that time.

Q. What, if any, further work did you do on these claims after locating them? A. When we were through locating we went back; we went to Ocktalee Spit and we located nine oil claims called the Minneapolis group, and then went back to Katalla.

Q. When did you return to the ground again, to the coal claims again? A. Some little time after or close after, I think, we discovered in the Record's office in Katalla. * * * I asked Lind to go back and let us look it up. Lind didn't want to go and I got one by the name of Beck to go back and when we came to Chilkat * * * I and Lind or Beck— I think we were up there about ten days at that time. We were prospecting and we located a claim in his wife's name, Aurora No. 7, at that time.

33 Q. Did you do anything further in the way of opening up a mine on each of these claims, Aurora No. 1 to 6 inclusive, at that time? A. Yes, we were prospecting around there on that ground, as far as I remember in different directions there; we had a tent—camped up there, close to this corner. We camped on No. 5.

Q. When were you on the ground again? A. 1906, with Bredenberg when we spent about two weeks "prospecting".

Bredenberg claims he found a four foot vein of coal on his claim and opened it up so that he could, but did not, mine coal from it.

Dahlgren claims that he found coal exposed in several places on

his claim but did not do much work on it when located but later some more work was done and he sent money for same several times.

However, all that was done by any was to find coal veins, open it up to a slight extent so as to expose same where not already exposed by nature or the effect of the elements.

The small amount of work done on these claims and the small amount of expenditure made therefor as shown by the testimony and as alleged and set forth in the coal declaratory statements and the application for patent, towards opening and improving a coal mine or mines on the lands involved, at the most, scarcely places this case on a par with the Willoughby case decided adversely to the claimants by this office, December 31, 1914, or the Wardell case also decided against the claimants by this office, which decision was sustained by the Department on June 24, 1914, and the work alleged and shown herein is of the same general nature and
34 extent.

In the Wardell case, it was found:

"That the work done upon the claim here under consideration was merely prospecting, and did not constitute the opening or improving a mine of coal as contemplated by the act of April 28, 1904 (supra), as a basis for the right to locate and enter unsurveyed coal lands in Alaska," and the work done and expenditures made herein, are vastly less than in the Scofield (Cunningham) case, 41 L. D., 176, and other cases decided adversely to the claimants on the question of sufficiency of work to constitute the opening and improving a coal mine or mines under the acts governing.

Therefore, your conclusion that charge No. 4 has been sustained by the Government is correct and affirmed as to all the claims involved herein.

In view whereof, it does not become necessary to dwell at length on the question involving the fraud charges.

It appears from the evidence of Asbjornson and his two companions who located the claims that prior to, and at the time of, location of same (except the claim of Holck which will be separately dealt with herein) there was no prior agreement or understanding between them as to the disposal or consolidation of same. Upon their return to Katalla after stopping to locate some oil claims en route, they talked over the situation and agreed that the matter of doing the so-called assessment work and prospecting, should be done together and that Asbjornson should have charge of, and attend to, same and represent them otherwise.

In the spring of 1906, Asbjornson gave an option to purchase to one King of Seattle, but the terms and details of this transaction are lacking.

35 Later in 1906, Asbjornson gave another option at $10.00 per acre to Mr. T. P. McDonald who paid the sum of $50.00 to bind the transaction, and in the spring of 1907, made a partial payment on the claims, of $400.00 per claim and each claimant appears to have received his share, at that time, or when the final payment was made by McDonald through a Seattle attorney who drew individual checks or drafts to each claimant except to Holck

and Elise Asbjornson whose share was paid to Torger Asbjornson, and he later paid Elise Asbjornson her share, less the deductions for the commission paid to King and a small amount retained by Asbjornson for his trouble and expense in the matter, the like deductions having been made as to the other claims.

As to the Holck claim which was located by Asbjornson later than the original ones and after the option to McDonald, the evidence clearly shows that it was made for the benefit of Asbjornson and that he received the benefit therefrom and this is admitted by Asbjornson. He testifies that Holck gave him a power of attorney in Seattle some time before the location and told him anything he located in Alaska he could have "for old friendship sake" and in answer to the question "that claim was all yours from the moment it was located", he replied "I took it so—I took it for that", and he admits he kept Holck's share of the money paid by McDonald for the claim, except the sum of fifty dollars which he afterwards gave to Holck.

After a careful consideration of the record, no sufficient reasons appear for disturbing your finding that charges Nos. 1, 2 and 3, were not sustained as to any of the claims, except Holck's and that as to that claim, charges Nos. 2 and 3 were not sustained,
36 but charge No. 1 was sustained and proved.

Your recommendation that the application for patent be rejected and the locations declared invalid, is concurred in and the application is rejected, subject to the usual right of appeal. Notify the parties and in due time make report of all action taken.

Very respectfully,

CLAY TALLMAN,
Commissioner.'

XIII. The relator and said locators conceiving themselves to be aggrieved under the forms of law without just cause by said decision of the respondent Tallman as such Commissioner, thereupon on July 1, 1915, an appeal to the respondent Lane, as such Secretary of the Interior, was taken by and in the names of the relator and all said locators, from that part of the decision of the respondent Tallman as such Commissioner which found and held that said charge numbered 1 of the United States against said Coal Claims had been sustained as to said Aurora No. 7 Coal Claim, and also from that part of said decision which found and held that said charge numbered 4 had been sustained as to all of said Coal Claims; and due notice of such appeal was filed in the General Land Office, and in the office of the Secretary of the Interior, and was served upon each respondent in his respective official capacity aforesaid, all according to the law and the practice of the General Land Office and of the Interior Department in that behalf. No appeal was taken by, or in behalf of, the United States or of "the Government" thereof from that part of said decision of said Commissioner which affirmed the decision of the register and the receiver of the Juneau Land District as to charges numbered

1, 2 and 3. Thereafter, at the City of Washington, said
37 appeal came on for hearing and argument before the respondent Lane upon the same evidence submitted to the respondent Tallman, and on none other, and was argued on written briefs by counsel for each party, and after such hearing and argument, to-wit: on January 24, 1916, said decision of the respondent as such Commissioner was affirmed by the respondent Lane as such Secretary of the Interior on the same grounds whereon was based the decision of said Commissioner, to-wit: that charge numbered 1 was sustained as to the Aurora No. 7 Coal Claim only, and charge numbered 4 was sustained as to all said eight Coal Claims, and on none other ground, reason or charge. Thereafter, and on February 7, 1916, the relator moved before the respondent Lane as such Secretary of the Interior for a rehearing on the ground of manifest errors in law made by him in his said decision, but such motion was by him overruled; and his said decision was duly entered on the records of the Interior Department, where the same remains on file and of record as a final determination of the subject-matter adverse to the rights of the relator and conclusive on all officials of the Interior Department and on the Executive branch of the government of the United States, except as the relator may be able to obtain just relief from this honorable court. The relator is ready to produce a certified copy of said Secretary's said decision and order as and when the court shall direct; and it now here submits to this honorable court a complete transcript of said decision, except that portion which copies verbatim said charges, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, January 24, 1916.

Ex parte Alaska Smokeless Coal Company, et al., "N"
38 Juneau—0490 Affirmed. Appeal from the General Land Office.

This is an appeal by the Alaska Smokeless Coal Company, Albin Bredenberg and others, from the decision of the Commissioner of the General Land Office of June 7, 1915, holding for rejection the application 0490, of the company to make entry of a consolidated group of eight coal claims denominated the Aurora Nos. 1 to 8, inclusive, situated in the Kyak recording district, Juneau land district, Alaska.

The coal claims in question are asserted to have been located under the act of April 28, 1904 (33 Stat., 525). The application was filed June 30, 1909, under the provisions of the said act of 1904, and the act of May 28, 1908 (35 Stat., 424). Notice thereof was contemporaneously published and posted for a period of sixty days commencing August 14, 1909. April 26, 1912, and pursuant to the Commissioner's direction of March 25, 1912, proceedings were instituted against the application on the following charges:—

(Omitted as above stated.)

The claims purport to have been located by the following persons on the respective dates set after their names:—

Aurora No. 1 by Elise Asbjornson, July 9, 1904,
Aurora No. 2 by Torger A. Feed, now Torger A. Asbjornson, July 6, 1914,
Aurora No. 3 by Walfred Dahlgren, July 9, 1904,
Aurora No. 4 by Albin Bredenberg, July 9, 1904,
Aurora No. 5 by Fred Lind, July 9, 1904,
Aurora No. 6 by Peter L. Peterson, July 9, 1904,
Aurora No. 7 by Ola M. Holck, Oct. 16, 1908,
Aurora No. 8 by Swan Swanson, Aug. 2, 1904.

Aurora Nos. 2, 3 and 4 claims purport to have been located by the locators themselves. The claims remaining having been made by Feed (or Asbjornson), as the agent or attorney in fact of the respective claimants.

Notices of said alleged locations were filed on the following dates:

No. 1, in the office of the district recorder, September 10, 1904, and in the local office August 1, 1905.

No. 2, in the office of the district recorder, September 10, 1904, and in the local office June 10, 1905.

No. 3, in the office of the district recorder, September 11, 1904, and in the local office August 1, 1905.

No. 4, in the office of the district recorder, September 15, 1904, and in the local office July 17, 1905.

No. 5, in the office of the district recorder, September 10, 1904, and in the local office August 8, 1905.

No. 6, in the office of the district recorder, August 22, 1904, and in the local office August 8, 1905.

No. 7, in the office of the district recorder, March 9, 1907, and in the local office March 21, 1907.

No. 8, in the office of the district recorder, September 10, 1904, and in the local office July 17, 1905.

At various times in the year 1908, the claims were conveyed by the individual locators thereof to eight different persons who, in turn, on divers days in March, 1909, conveyed them to the applicant company. Previously, however, and in 1908, an option of purchase had been given by the locators, acting through their attorney in fact Torger A. Asbjornson, to one Thomas P. McDonald, and it appears that the claims were conveyed by the locators to the persons designated by him. The notices of location filed in the local office respecting the Nos. 5 and 6 claims, contain no
40 allegations as to the opening or improving of a mine or mines of coal thereon save the mere averment that the claimants had caused a valuable mine of coal to be opened on their respective claims. In the notice filed in the local office by Holck respecting the No. 7 claim, it is averred merely that "I have discovered valuable coal thereon." In the notice by Elise Asbjornson respecting the No. 1 claim, she avers that "I have caused to be located and opened a valuable mine of coal thereon and have expended in labor and improvements upon said claim the sum of ten dollars and fifty cents." In the notice executed by Feed, or Asbjornson as to the No. 2 claim he avers that he "located and opened a valuable mine of coal on the claim and expended in labor and improvements thereon the sum

of $10.50 in excavating the ground and taking out soil to such an extent as to ascertain that there were veins of coal, and opened two different veins of coal, one of which is 12 feet thick and the other about 6 feet thick, where I did the opening." Substantially the same statements are made by Dahlgren and Bredenberg in their notices as to respectively the Nos. 3 and 4 claims. Lind and Swanson in their notices regarding respectively the Nos. 5 and 6 claims, aver that "I have caused to be opened a valuable mine of coal thereon." Swanson alleging further the expenditure of $10.50 in labor and improvements on the claim. The notices of Elise and Torger Asbjornson, Bredenberg, Dahlgren, Swanson and Peterson filed in the local office, were subscribed and sworn to by the locators in July, 1905, Lind's June 30, 1905, and Holck's February 27, 1907.

In the application to purchase which was subscribed and sworn to May 21, 1909, it is averred:

That the said corporation and its assignors have expended
41 in developing coal mines on said tract, in labor and improvements, the sum of three thousand four hundred forty-four and 76/100 dollars ($3,444.76), as follows: in surveying, three thousand one hundred ninety-eight and 82/100 ($3,198.82); in developing and opening coal veins, two hundred forty-four 94/100 dollars ($244.94).

In an affidavit as to improvements on said claims, subecribed and sworn to March 18, 1910, by G. F. McDonald, who it appears performed some work on the claims in 1907, which affidavit is filed by the company in support of the application, it is averred that affiant—

* * * is well acquainted with the character of the land in said consolidated coal claim, and with the nature, extent and value of the improvements placed thereon by the said applicant company or its grantors, or at their expense; that he has frequently passed over and upon said consolidated coal claim and each and every tract and part thereof; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto, that the same is chiefly valuable for coal;

That the nature, extent and value of the improvements placed upon said consolidated coal claim by the said applicant company or its grantors, or at their expense, is as follows: two hundred and fifty dollars in improvements on open cuts disclosing coal on five claims.

This affidavit is corroborated by A. N. Prather and E. J. Campbell which affidavit is subscribed and sworn to March 16, 1916.

The evidence adduced at the h-aring shows that the initial work relied upon by applicants as the basis of six of these pur-
42 [illegible] was performed by Asbjornson assisted by [illegible] and Bredenberg. This consisted in going upon the ground in 1904, performing some work upon some of the claims in the shape of digging with a pick and staking the claim. It seems that about four days were spent in the performance of this work. Thereafter and during the same year, Asbjornson, in company with one Beck, went upon the land and spent about ten days prospecting

for coal. During this period also Asbjornson appears to have made the location No. 8 which was made in Swanson's name. Nothing else appears from the evidence to have been done upon the land until 1908, when, according to the testimony of Asbjornson, he and Bredenberg again went thereon and spent about two weeks prospecting. It was during this period evidently the Holck's claim, the No. 7, was located. It is testified on behalf of the claimants by said Thomas P. McDonald that in 1906, he made an examination of the area included in the group of claims applied for and found nothing thereon in the shape of mining improvements save a number of open cuts, many of which were of small dimensions but some from fifteen to twenty feet in length; that none of said openings appeared to be more than three or four feet in width. The testimony of other witnesses for the applicant is to the effect that as late as 1911 the workings upon the claims consisted of mere surface openings. None of these openings, so far as shown, was made with the view to the actual mining of coal therefrom on any of the claims, but, on the contrary, all seem to have — made solely for prospecting or exploiting purposes and to determine the extent and character of the coal underlying the area. The evidence further shows that none of the locators had had any experience in coal mining
43 and that with the possible exception of Swanson, none was financially able to equip or open and operate a mine, or even to pay for the land included in his location, but that all of them at all times after the dates of their respective locations, had in active contemplation a sale of the property, although some testify, vaguely and indefinitely, to an intent to mine and dispose of coal from their respective claims, if possible, in the event they should be unsuccessful in their efforts to sell their claims. The testimony, as a whole, considered in the light of the allegations contained in the location notices filed in the local office, and the averments made in the company's application to purchase and affidavits filed to support the same, clearly shows that the work was performed without any reference to active mining operations and for prospecting purposes pure and simple.

November 12, 1906, the President withdrew all the coal lands in Alaska from location, filing and entry, and by other orders withdrew various bodies of coal land in the United States from filing and entry. January 15, 1907, he modified the previous withdrawals as follows:

Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal land laws and existent at the date of such withdrawal.

In promulgating this order of modification the department issued the following instructions (35 L. D., 395):

Any person seeking to perfect a right alleged to have been existent at the date of the withdrawal must, in addition to the showing
44 now required by the regulations, submit his affidavit or that of his duly authorized agent, setting forth specifically the conditions under which the claim was made and the different steps taken to perfect the same.

By executive order of July 1, 1910, the order of withdrawal of November 12, 1906, was ratified, confirmed and continued in full force and effect and subject to the provisions, limitations, exceptions and conditions contained in the act of June 25, 1910 (36 Stat. 847). All public lands and lands in National Forests in the district of Alaska in which workable coal is found to occur, were withdrawn from settlement, location, sale or entry and reserved for classification and in aid of legislation affecting the use and disposition of coal deposits.

Respecting the disclosure of coal at points within the limits of the several claims here involved as of the date of the 1906 withdrawal, the evidence is indefinite and unsatisfactory. It appears that only four witnesses—Asbjornson, Bredenberg, Dahlgren and T. P. McDonald—in the case, were on the land prior to the 1906 withdrawals.

Asbjornson testifies that he was on the ground for five days in July, 1904, at the time the claims were located in company with Dahlgren and Bredenberg; that he and one Beck spent about ten days prospecting on the ground in the fall of 1904, and that in 1906, he and Bredenberg were there for a period of about two weeks. No excavating to amount to anything appears to have been performed upon the land in July, 1904, as witness and his associates had with them no implement or tool for excavating save a pick. Witness testifies that on the Aurora No. 1 claim, they opened up quite a few veins near the west line so that the veins were exposed; that he could judge that one of said veins was three or four feet in thickness. On the Aurora No. 2 he testifies, they found coal before locating the claim. It was quite a large vein. On this claim near the west line he opened up a vein six or seven feet thick. Dug into it so that the vein could be seen and could have taken out coal from the opening there. On the Aurora No. 3, they exposed a vein which he should judge was about three feet in thickness, in the fall of 1904. On the Aurora No. 4 claim, witness and Beck in the fall of 1904, did some work near the middle of the claim, opening up a vein in two places. These openings showed coal to the thickness of three or four feet. Did not measure the vein but he thought it was something like that in thickness. It was good coal and could have been taken out of that opening. On the Aurora No. 5 they found a good sized vein before locating the claim and in the fall of 1904, they exposed a vein four or five feet thick. It was good coal and could have been mined from that opening and sacked if there had been any demand for it. They found coal on the Aurora No. 6 claim before locating it. Witness and Bredenberg were on this claim in 1906, and the vein was exposed to a thickness of three or four feet, and coal could be taken therefrom. On the Aurora No. 8 claim, they found coal before locating. The vein was exposed to a thickness of four or five feet.

T. B. McDonald testifies that he was on the land in August, 1906, in company with Asbjornson and Bredenberg, for perhaps four hours. He visited the land again the summer of 1907, and during

July of that year witness' brother, George P. McDonald, spent
46 about two weeks in opening up or cleaning out excavations and in further cross-cutting the veins or openings that had been made by the original locators of the claims. In 1905, the work that had been previously performed had, on account of the prevalence of rain and the soft nature of banks, filled up more or less. He testifies as to the exposure made in some of the openings without reference to the date of his observation, leaving it uncertain as to whether it was that of 1906 or 1907. He found in a certain opening on the Aurora No. 2, a vein which he should judge was fifteen or sixteen feet in thickness. It was a remarkably clean vein of coal and was ample to demonstrate beyond question that there was a vein of coal there, remarkable for purity as well as size. In 1906, he visited two openings on the Aurora No. 5, found two large workable veins. He also visited some openings on the Aurora No. 6 claim, but does not describe the material exposed therein. He observed other veins of coal on the ground but could not tell definitely how thick they were, he would say however that some were quite large workable veins. There were apparently good sized veins on the Aurora No. 6.

Bredenberg testifies that on the Aurora No. 4 claim, the one located by himself, they made an opening on a vein that was about one or two feet thick.

Dahlgren testifies that on the Aurora No. 3 claim, located by himself, he found coal sticking out of the ground and that they dug around it with picks. He thinks that this coal was two or three feet thick. They did not have at that time tools to do much work.

Other witnesses testified as to conditions and disclosures
47 on the ground in 1909 and 1911, but it is not shown which, if any, of the openings in which these disclosures were made existed as of the date of the 1906 order of withdrawal.

By section 1 of the act of April 28, 1904, supra, under which these claims are alleged to have been located, it is provided:

That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making locations, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

By section 1 of the act of May 28, 1908, supra, it is provided:

That all persons, their heirs or assigns, who have in good faith

48 personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions, issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs or assigns may form associations or corporations who may perfect entry of, and acquire title to, such lands in accordance with the other provisions of law under which said locations were originally made: Provided, that no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

These acts, therefore, make provision for the sale only of unsurveyed coal lands in Alaska, in rectangular tracts containing 40, 80 or 100 acres, upon which a coal mine or coal mines have been opened or improved and included in valid locations made prior to November 12, 1906, or in accordance with the departmental instructions of May 16, 1907. In construing the provisions of these laws, the Department has held that said acts contemplate as a basis of a valid location the opening and development of a producing mine of coal and that work performed upon a claim merely for prospecting purposes, does not fulfill the requirement. Andrew L. Scofield et al. (41 L. D., 176); John L. Long (43 L. D., 305); United States v. Munday (222 U. S., 175).

49 It appearing from the record in the case, as above stated, that the work performed upon the claims here in question, consists only of shallow surface cuts and openings made merely for prospecting purposes and not for the purpose of the opening or improving of a producing coal mine or mines, it must be held that none of the asserted locations included in the application affords a sufficient basis for entry and patent under the coal land laws. For these reasons, therefore, and aside from any other reason, the application must be rejected.

The decision of the Commissioner is accordingly affirmed.

Pending determination of the case by the Department, there was filed a relinquishment by the Company of all its right, title and interest in and to the area included in the Aurora No. 7 claim purported to have been located by Holck, together with an application for the return of the purchase price paid for said area. When this decision shall have become final, the Commissioner will take appropriate action on said application for repayment.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary."

XIV. Said locators, in opening said mines on their respective Coal Claims in good faith and by the expenditure of labor and of money by them severally and respectively, did the following im-

provements and work on said several claims, as the facts were, and as the same were found to be the facts by the findings and adjudications of said register and said receiver of the Juneau Land Office and of the respondent Tallman as such Commissioner and of the respondent Lane as such Secretary of the Interior, based upon said evidence, to-wit:

50 On Aurora No. 1 Coal Claim a vein of three or four feet in thickness was opened and exposed on several places near the west line of said Coal Claim.

On Aurora No. 2 Coal claim a vein six to seven feet thick was opened and exposed so that coal of commercial value could be mined therefrom.

On Aurora No. 3 Coal Claim a vein of coal three feet in thickness, well to the north on the west line of said Coal Claim was opened and exposed and openings to the east of the east line and to the south of the south line at the southeast corner on adjoining lands show veins that probably dip into, and under, said Aurora No. 3 Coal Claim.

On Aurora No. 4 Coal Claim, veins showing coal of about three feet in thickness, were opened in two different places near the center of the claim and the coal was dug across the face of the vein. Also other openings were made on said Coal Claim which show veins nine, ten, ten and one-half and fifteen feet in thickness, respectively.

On Aurora No. 5 Coal Claim, a vein from four to five feet in thickness, containing good coal, was opened and exposed so that such coal could be mined out of the opening made, and according to different witnesses, two large workable veins and four workable veins were found to exist on this Coal Claim.

On Aurora No. 6 Coal Claim a vein of from three to four feet in thickness, from which coal could be mined, was opened and four other openings on this claim were made, which showed coal five and six feet in thickness. At least one of these veins was a valuable vein.

On Aurora No. 7 Coal Claim no work was shown to have been done.

51 On Aurora No. 8 Coal Claim a vein which showed coal of three or four feet in thickness was opened.

All of said coal claims contained coal and were classed by the officials of the Government as coal lands. All of said locators, except said Ole M. Holck, did said work and expended money in so doing, prior to November 12, 1906, in good faith and for the purpose of acquiring said lands as coal lands, under the statutes of the United States and the rules and regulations of the Interior Department, and of entitling themselves to acquire the same; and said locators, their said assigns and the relator in all have expended in opening said coal mines and in surveying said coal claims preparatory to further work and development and to application for patent, the aggregate sum of thirty-four hundred, forty-four and 76/100 ($3444.76) dollars.

XV. On October 18, 1915, at said City of Washington, and while said appeal from the respondent Tallman as such Commissioner of the General Land Office to the respondent Lane as such Secretary of

the Interior was pending, the relator in view of the uncertainty of the facts as to the intent and good faith of said Ole M. Holck, accorded to said Acts of Congress, and being itself ignorant and innocent of any wrongful or illegal intent or any bad faith in the premises, withdrew its application for a patent upon, and only upon and only so far as concerned, said Aurora No. 7 coal claim, and the land comprising an acreage of 133,560 acres therein contained, surveyed and certified as aforesaid, and therewith relinquished all right, title, equity and interest which it ever had, or might have had, upon and for said land, and applied for repayment of the sum
52 of one thousand three hundred thirty-five dollars and sixty cents which it had paid, as aforesaid, to the Treasurer of the United States, pursuant to law, as the purchase price of the parcel of land so designated and identified. Said relinquishment and application still remain on file and undisposed of, in the Interior Department. The relative location of said Aurora No. 7 coal claim to said other seven coal claims, and of said other seven coal claims to each other, is such that after the withdrawal of said Aurora No. 7 coal claim, and its elimination from the plat of said Consolidated Coal Claim, the remainder, comprising a total acreage of eight hundred fifty-seven acres and fourteen thousandths of an acre, constitute a sincle tract, wholly contiguous, in dimensions and shape nowhere of greater length than twice its greatest width.

XVI. The relator respectfully submits to this honorable court, upon the facts hereinabove set forth, that the respondent and his said subordinates have erred, not in the facts, but in their interpretation and construction of the Acts of Congress and of the law pertaining to coal mines in or under public lands of the United States in Alaska, and to the rights of location, application and patent thereof by locators and their assigns—to the grievous wrong and injury and the irreparable damage of the relator, unless the same can be redressed in the courts of the United States; that by such rulings and decisions he and they have departed from, and ignored the settled interpretation and construction of, the law in this behalf, and thereby exceeded his and their powers and jurisdiction;
53 that said errors in law and said wrong and injury are subject to review and redress in this honorable court and in other courts of the United States, and therein may be corrected and full justice may be done to the relator, but save by the process of the writ of mandamus of this court and in this proceeding, the relator is without adequate remedy at law or in equity.

Wherefore, the relator prays this honorable court that, the premises being considered, it will grant to the relator its alternative writ of mandamus, directed to the respondents, the Honorable Franklin K. Lane, as the Secretary of the Interior Department of the United States, commanding him as such Secretary, that he either approve and pass to patent said application of the relator for a patent of the United States, granting to the relator the title in fee simple of the lands embraced in said coal claims, designated as Aurora Nos. 1, 2, 3, 4, 5, 6 and 8, and identified by said surveys and other documents in his office and department and order the respondent, the Honorable

Clay Tallman, as the Commissioner of the General Land Office, that he issue such patent and otherwise cause justice to be done to the relator in this behalf; or that in default of his so doing, he show cause before and to this court, at a day and place to be in said writ fixed, why he has not so done, and why he should not by this court be peremptorily commanded so to do, and what, if any, legal excuse for his non-action and his rejection of the relator's said application he can submit to this court; and otherwise that he stand to, abide and perform the order and judgment of this court in the premises; and also directed to the respondent the Honorable Clay Tallman, as the Commissioner of the General Land Office
54 in said Interior Department, commanding him as such Commissioner, that he either cause to be prepared, executed, issued and delivered to the relator such a patent of said lands, known as the Aurora Nos. 1, 2, 3, 4, 5, 6 and 8 coal claims, and otherwise cause justice to be done to the relator in this behalf; or that in default of his so doing, he show cause before and to this court at a day and place to be in said writ fixed, why he has not done so and why he should not by this court be peremptorily commanded so to do, and what, if any, legal excuse for his non-action and his rejection of the relator's said application he can submit to this court; and otherwise that he stand to, abide and perform the order of this court in the premises; and farther, that upon the hearing of said respondents' joint return to said writ, or their several returns, as they may be advised, and upon and after other appropriate proceedings in this cause, a peremptory and final writ may be issued to the respondents and to each of them severally and respectively, commanding them to so approve and pass to patent said application and to so cause such patent to be prepared, executed, issued and delivered to the relator as the relator hath herein prayed, in order that right and justice may be done to the relator; and it prays that it may have, and receive, such other and farther writs, process and relief as of right it ought to have and receive.

ALASKA SMOKELESS COAL COMPANY,
By CHARLES E. SHEPARD,
Its Secretary, Relator.

CHARLES E. SHEPARD,
JAMES R. CATON,
H.
A. A. HOEHLING, JR.,
HOEHLING, PEELLE & OGILBY,
Attorneys of Relator.

Address: 1416 F Street, Northwest, Washington, D. C., or 614 New York Bldg., Seattle, Wash.

55 UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

Charles E. Shepard, being sworn, says that he is the Secretary of the above-named relator and has been such secretary ever since its

incorporation, and as such he makes this verification in its behalf; that he is acquainted with the facts set forth in the foregoing petition, and all thereof are substantiated by documents which are either in his possession as such secretary or are on the files of the Interior Department and of its subordinate offices mentioned in said petition; and that all the allegations of said petition are true to the best of his knowledge, information and belief, and are true as he verily believes.

CHARLES E. SHEPARD.

Subscribed and sworn to before me this 21st day of October, 1916.

[SEAL.] CLARK M. BURKHEIMER,
Notary Public in and for the State of Washington, residing at Seattle.

Rule to Show Cause.

Issued November 29, 1916.

* * * * * * *

Upon consideration of the petition filed in the above-entitled cause, and upon application in that behalf made herein, it is, by the Court, this 29th day of November, 1916, ordered:

That the respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land
56 Office, be, and they hereby are required to show cause, if any they have, on or before the 8th day of December, 1916, at 10 o'clock A. M., why the writ of mandamus should not issue as in said petition prayed; provided, that a copy of the said petition and of this order be served upon said defendants on or before the 2nd day of December, 1916.

F. L. SIDDONS, *Justice.*

Respondents' Answer.

Filed December 11, 1916.

* * * * * * *

Come now the respondents in the above-entitled action and by way of return to the rule to show cause herein issued and for answer to the relator's petition, show:

That they by law are constituted the sole disposing agents of the Government in the administration and disposal of public lands by and through the means appointed by Congress, and that to the land department, of which the respondent Franklin K. Lane is the administrative head, and in which the respondent Clay Tallman is the Commissioner of the General Land Office, Congress has committed exclusive jurisdiction to determine the validity of all claims or applications to enter, purchase, or acquire any part of the public domain;

to hear and determine all questions of fact involved in the presentation of such claims or applications, and to determine whether or not the applicant or claimant, on the facts presented, has complied with the law under which it is sought to acquire title to the land; and that the exercise of that jurisdiction involves judgment and discretion;

That the relator, as the petition exhibits, sought to acquire
57 title to the lands here in controversy, under the provisions of the act of April 28, 1904 (33 Stat., 525), and the act of May 28, 1908 (35 Stat., 424), in the manner, and by virtue of certain locations set forth in said petition, and the validity of said locations and the right of the relator to acquire, from the United States, the fee simple title thereto, in due course, came on to be heard and determined by the respondents in the exercise of their jurisdiction as aforesaid, and were heard and determined the relator being at all times accorded due process of law; that after considering all the evidence and applying the law thereto, the respondents found and determined that the locations involved in this action were invalid in that the locators and claimants had not opened or improved any mine or mines of coal on any of the tracts of land in controversy, within the meaning of, and as required by, the act of April 28, 1904, and that the relator was therefore not entitled to purchase the same under the provisions of said act; and thereupon, and in the exercise of their judgment and discretion, the respondents rejected the application of the relator to purchase the lands in controversy.

Wherefore having made complete return to the rule and answer to the petition, they pray that the said rule may be discharged, that the petition be dismissed, and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

CHARLES D. MAHAFFIE,
Solicitor;
C. EDWARD WRIGHT,
Assistant Attorney.

58 DISTRICT OF COLUMBIA, *ss:*

I, Franklin K. Lane, Secretary of the Interior, on oath depose and say that I have read over the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein set forth I am informed are true and I believe them to be true.

FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to this 9th day of December, 1916, before me.

[SEAL.]

EDWD. B. FOX,
Notary Public in and for the District of Columbia.

Demurrer.

Filed December 22, 1916.

* * * * * * *

Comes now the relator and says that the return and answer of the respondents in the above entitled cause is bad in substance.

And the relator further says that the respondents' answer therein does not set forth any substantial or legal defense to the relator's petition nor show any cause why the prayer of the petition should not be granted.

And thereof it prays judgment as it has heretofore prayed.

CHARLES E. SHEPARD,
JAMES R. CATON,
HOEHLING, PEELLE & OGILBY,
Attorneys of Relator.

59 NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. That the respondents in rejecting application of the relator for a patent, have erred in matter of law in that they have held upon the facts proved and admitted and without any matter of fact being in dispute between the Government and the relator, that the relator is not entitled to a patent under the acts of Congress in this behalf.

2. That the respondents have erred in matter of law and without any dispute in matters of fact between the Government and the relator, that the relator and its grantors, immediate and remote, have not opened or improved a mine under the acts of Congress in this behalf.

3. That the respondents have erred in matter of law in that they have held, without any dispute in matters of fact between the Government and the relator, that the word 'mine' under the acts of Congress in this behalf, designates a developed coal property or one prepared and ready for commercial exploitation and not the body of mineral produced by nature and existing in or under the surface of the land.

4. That the respondents have erred in matter of law and without any dispute in matters of fact between the Government and the relator, that they are not bound by, and their acts are not under the control of, the decisions of the courts as to matters of law and as to the construction of the acts of Congress relative to the public lands of the United States but the applicants for patents for such lands are subject to the uncontrolled and arbitrary discretion and judgment of the respondents.

5. That the respondents have erred in matter of law and without any dispute in the matters of fact between the Government and the relator in that they have held that the relator's rights are not

60 determined by the established and settled course of decision and adjudication in the courts of the United States and in the decisions, rulings and practice of the Interior Department as to applications for patents of the public lands of the United States and the required conditions of procuring the same as the same existed when the locators and the grantees took the several steps set forth in the petition; and that they have held that the relator and its grantors, by said steps, acquired no vested rights, but that their rights are subject to, and controlled by, the rulings, regulations and practice of the Department as they have been changed since the date of said locations and other steps.

6. That it appears from the pleadings that the relator by virtue of said locations and other steps leading up to its application for a patent, is entitled to a patent conveying absolute fee simple title to the lands embraced in its application.

7. That no good or legally sufficient reason is set forth in said answer of the respondents why a patent to the seven coal claims enumerated in the petition should not issue to the relator; nor why a peremptory writ of mandamus should not issue, requiring the respondents to cause such patent to be issued and delivered to the relator as is in the petition herein prayed.

CHARLES E. SHEPARD,
JAMES R. CATON,
HOEHLING, PEELLE & OGILBY,
Attorneys of Relator.

61 *Opinion of Court.*

Filed February 1, 1917.

* * * * * * *

This is a proceeding for a writ of mandamus, and the petition prays that an alternative writ be granted to the relator, directed to the respondents, the Secretary of the Interior Department and the Commissioner of the General Land Office, commanding the former that he either approve and pass to patent the application of the relator for a patent of the United States, granting to it the title in fee simple to certain lands hereinafter more specifically described, and to order the Commissioner of the General Land Office that he issue such patent, and that in default of his so doing that he show cause why he has not done so, and why he should not be required by the Court so to do; also praying that said writ be directed to the respondent Commissioner of the General Land Office commanding him to either cause to be prepared, executed, issued and delivered to the relator the said patent, or in default of doing so, to show cause why he has not done so, and why he should not be required by the Court to do so; and that, upon a hearing of the respondents' return to said writ, a peremptory and final writ be issued directed to each of the respondents, commanding them to do the things mentioned.

A brief statement of the material facts necessary in the Court's opinion for a proper disposition of this application will be made.

The relator is a corporation, and the grantee by mesne conveyances of all the rights acquired by certain locators to certain coal claims located in what is known as the Bering Coal Field,
62 in the Kayak Recording District in the Juneau Land District in the territory or district of Alaska. The claims were originally eight in number, and have been named and numbered as Aurora No. 1, and so on in sequence to and including Aurora No. 8. The claim, however, to Aurora No. 7 the relator has abandoned. The claims to be dealt with, therefore, are those named and numbered Aurora No. 1 to No. 6, inclusive, and Aurora No. 8. The location of these claims were effected, according to the petition, in the months of July and August, 1904, and also, according to the petition, all steps then required by law to be taken to perfect the locations and entitle the locators or their grantees to a patent or patents for said lands, were taken. These steps included such action as would entitle the party or parties claiming a patent to secure one covering all of the claims as one tract of contiguous lands, and thereby acquiring a title in fee to all of them as a so-called Consolidated Coal Claim. The petition further alleges that the steps thus taken finally ripened into an application by the relator for a patent of the United States, granting to it in fee simple the said coal claims or lands as a consolidated coal claim, and that while this application was pending, an investigation of alleged or assumed violations of the laws of the United States and regulations of the Interior Department concerning the location and acquisition of coal lands in Alaska was directed by the respondent Commissioner of the General Land Office; that as a result of this investigation proceedings were instituted against the said application and against the locators and the relator as an applicant for the said patent, on four charges, the first three of which will not
63 be given further attention as the findings on these three charges were in favor of the locators and the relator, excepting as to Claim described as Aurora No. 7, which, as stated, the relator has abandoned. Charge No. 4, however, was sustained by the various tribunals, who, under the law, were authorized to hear and determine it, including the two respondents. Charge No. 4 is in the following words:

"4. That the above locators and claimants of the several tracts and parcels of land covered by and embraced within the above mentioned coal declaratory statements did not, they nor any of them prior to making such locations or at any time thereafter and prior to filing notices of said location open or improve any mine or mines of coal on any of said tracts of land, as required by the act of April 28, 1904 (33 Stat., 525)."

On these charges a great deal of testimony was taken, and the case finally came on for hearing and determination by the Register and Receiver of the Juneau Land District. These officials held that the Government had failed to sustain charges numbered two and three, and also charge numbered one, excepting as to coal

claim, Aurora No. 7, as to which they found the charge sustained; and they found that said Charge No. 4 had been sustained. They therefore decided and recommended that the application for a patent be rejected.

This decision was certified to the respondent Commissioner of the General Land Office, and an appeal taken by the relator and said locators from this decision to the respondent Commissioner as to that part of the decision which found and held that Charge No. 1 as to Coal Claim Aurora No. 7 had been sustained and that Charge No. 4 had been sustained. No appeal was taken by or in behalf of the United States from this decision which held
64 in favor of the relator and the locators as to charges numbered two and three, and also as to Charge No. 1, excepting that part of it as dealt with Coal Claim Aurora No. 7.

The appeal was heard by the respondent Commissioner and the decision of the Register and Receiver of the Juneau Land District was affirmed.

Thereupon the relator and said locators appealed from the decision of the respondent Commissioner to the respondent Secretary of the Interior, the Government not taking an appeal from so much of the decision as was in favor of the relator and locators.

The appeal to the Secretary was heard, and on, to wit, January 24, 1916, the decision of the respondent Commissioner was affirmed. Thereafter, the relator moved for a rehearing, which motion was overruled, and the decision of the Secretary was thereupon duly entered upon the records of the Interior Department, where it remains on file and on record as a final determination of the subject-matter, adverse to the rights of the relator, and conclusive on all officials of the Interior Department and on the executive branch of the Government of the United States, except as the relator may apply for and obtain relief in this Court.

The answer of the respondents to the rule to show cause and to the relator's petition, made through the respondent Secretary of the Interior, avers that the two respondents are by law constituted the sole disposing agents of the Government in the administration and disposal of the public lands, by and through the means appointed by Congress; and that to the Land Department, of which the respondent Secretary is the administrative head, and of which the respondent Commissioner is Commissioner, Congress has
65 committed exclusive jurisdiction to determine the validity of all claims or applications to enter, purchase, or acquire any part of the public domain; to hear and determine all questions of fact involved in the presentation of such claims or applications, and to determine whether or not an applicant or claimant on the facts presented has complied with the law under which it is sought to acquire title to the land; and that the exercise of the jurisdiction so conferred involves both judgment and discretion on the part of the respondents. It then proceeds in a brief way to state the attempts of the relator to acquire title to the lands in controversy, and that its claims thereto came on to be heard and determined by the respondents in the exercise of the jurisdiction mentioned, and

were heard and determined by them; that in the proceedings leading up to and including this determination the relator was at all times accorded due process of law.

To this answer, the relator interposed a demurrer, which attacks the return and answer as being bad in substance, and further that it does not set forth any substantial or legal defence to the relator's petition, nor show any cause why its prayers should not be granted. Various matters of law as raised by the demurrer are noted thereon. Of these, two were pressed at the argument. The first is sufficiently stated in Paragraph No. 3 of the note to the demurrer, as follows:

"3. That the respondents have erred in matter of law in that they have held, without any dispute in matters of fact between the Government and the relator, that the word 'mine' under the acts of Congress in this behalf, designates a developed coal property or one prepared and ready for commercial exploitation and not the body of mineral produced by nature and existing in or under the surface of the land."

66 and the second is presented in Paragraph No. 5 of this note, and is as follows:

"5. That the respondents have erred in matter of law and without any dispute in the matters of fact between the Government and the relator in that they have held that the relators' rights are not determined by the established and settled course of decision and adjudication in the courts of the United States and in the decisions, rulings and practice of the Interior Department as to applications for patents of the public lands of the United States and the required conditions of procuring the same as the same existed when the locators and the grantees took the several steps set forth in the petition; and that they have held that the relator and its grantors, by said steps, acquired no vested rights, but that their rights are subject to, and controlled by, the rulings, regulations and practice of the Department as they have been changed since the date of said locations and other steps."

In the final analysis, however, of the contentions made in the relator's behalf, its complaint may be summarized thus: That the respondents, in their decisions referred to, misinterpreted or misconstrued the law under which the relator is claiming a patent, in this, that the work done by the locators of these coal claims in disclosing coal upon the lands was not an opening of a mine within the meaning of the statute relied on, which is the Act of Congress approved April 28, 1904, 33 Stat. L. 525, the application for patent being made under the provisions of this Act and the Act of May 28, 1908, 35 Stat. L. 424.

The respondents in their respective decisions have found from the evidence that the character of the work done by the locators on the claims in question amounted to no more than this: A few trenches or holes were dug which disclosed in varying quantities, coal, most of it very near the surface of the land, and none of it at a greater depth than fifteen or twenty feet, and that this work was

nothing more than mere prospecting work, designed to dis-
67 cover if coal existed. The respondents then held that this was not the opening of a mine within the meaning of the Statute, taking the position that the correct construction of the statute in this respect meant that such work must be done as made possible the taking out of coal for commercial purposes, and in effect at least, holding that the work done in merely prospecting for coal, that is, in ascertaining whether or not coal existed in lands, was quite a different thing from the opening of a coal mine within the purview of the statute.

The relator, on the other hand, contends with earnestness that a true and proper construction of the statute means this: First, that a mine is the existence in the earth at a given point or points of minerals or metals useful to mankind, and that any work done which discloses the existence of bodies of minerals or metals is an opening of a mine within the meaning of the statute; and it insists that this has been the construction of the law by the administrative and executive officers of the Department of the Interior, including the Land Office, until very recent years, and was the construction at the time the locators did the work in question; that it is only within recent years that those administrative and executive officials have reversed the previous rule of interpretation or construction of the law, and taken the position assumed by the respondents in their respective opinions and decisions in this case. The relator has cited a number of decisions which it insists sustain its contention in this respect, but this is not admitted by the respondents, who have undertaken to distinguish the cases so relied on by the relator, and to show that they are not really susceptible of the meaning and in-
terpretation given to them by the relator, and they say that
68 their opinions and decisions rendered in this case follow the opinions and decisions in the cases of Andrew L. Schofield, et al., 41 L. D. 176; John L. Long, 43 L. D. 305; Alaska Petroleum and Coal Company, 45 L. D. 56 and 65. They go further and they insist that their construction or interpretation of the Statute is not only a possible construction or interpretation, but is the sound and correct one, and they say that this Court has no jurisdiction in this state of affairs to review, in a mandamus proceeding, the construction or interpretation thus placed by them upon the statute.

The position thus taken by the respondents is abundantly justified by decisions of the Supreme Court and of the Court of Appeals of the District of Columbia. Riverside Oil Company v. Hitchcock, 190 U. S. 316; U. S. ex rel. Ness v. Fisher, 223 U. S. 683. This Court, therefore, while not intending to intimate what is the correct construction or interpretation of the Statute in question, holds that the construction and interpretation given to it by the respondents in disposing of the relator's application is a possible construction, not strained or far-fetched, and, being so, it must, of course, give effect to the rule quite recently affirmed by the Court of Appeals this District in the case of U. S. ex rel. Red River Lumber Co. v. Fisher, 39 App. D. C. 181, the Court using this language:

"The sole question presented turns upon the interpretation placed

upon the act of Congress by the Secretary of the Interior. It is manifest that in the disposition of the case he was called upon to interpret the statute. That he may have wrongfully construed it will not authorize the issuance of the writ. * * * His construction of the act was a possible one, and will not, therefore, *be* reviewed in mandamus."

This rule seems to the Court to be in harmony with the evident policy of the legislation of Congress which has committed
69 to the Secretary of the Interior and the Commissioner of the General Land Office, the jurisdiction, power and authority in the matter of the disposition of the public domain, a jurisdiction which Congress had the power to confer, and which the Courts ought not to interfere with, unless in its exercise it is clearly to be seen that the rights of the citizen are being ignored or arbitrarily denied.

In this case, it is evident that extensive investigation of the facts developed by the evidence adduced, was made, and careful consideration of this evidence was given, and three different tribunals reached substantially the same conclusions on the law and the facts. For this Court to undertake, in a mandamus proceeding, to review the action of the respondents is, it seems to the Court, to convert a mandamus proceeding into an appeal or writ of error. This is not its function. Riverside Oil Company v. Hitchcock, supra.

The Court is also of the opinion that the doctrine of stare decisis invoked by the relator in this case should not be applied. It is not at all clear that the rule which the relator deduces from the earlier decisions of the Land Department, including the various Secretaries of the Interior, is so clearly deducible therefrom, if at all, as to warrant the Court in applying the doctrine in the relator's favor; and the contentions in that behalf the Court rejects.

For the foregoing reasons, the demurrer of the relator to the respondents' return must be overruled; and it is so ordered.

F. L. SIDDONS, *Justice.*

February 1, 1917.

70 Supreme Court of the District of Columbia.

THURSDAY, February 1st, 1917.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * * * *

Upon consideration of the demurrer of the petitioner filed herein by its attorneys of record to the return and answer of defendants, it is ordered that said demurrer be and the same is hereby overruled.

FRIDAY, February 16th, 1917.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * * * *

This cause came on heretofore to be heard upon the petition, the rule to show cause issued thereon, the answer and return of respondents, and the demurrer of petitioner and was argued and submitted to the Court and said demurrer overruled. Now come the parties hereto by their respective attorneys of record; whereupon, the petitioner by his said attorney elects to stand upon said demurrer filed herein.

Wherefore, it is considered that the rule to show cause be, and the same is hereby discharged and the petition dismissed. Further it is considered that the defendants herein recover of the petitioner their costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing the petitioner by his attorney of record, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond for costs is hereby fixed in the sum of One
71 Hundred Dollars ($100.00), with leave to deposit the sum of Fifty Dollars ($50.00) with the clerk, in lieu thereof.

Memorandum.

February 21, 1917.—Appeal bond approved and filed.

Assignments of Error.

Filed February 27, 1917.

* * * * * * *

The appellant, The United States of America ex rel. Alaska Smokeless Coal Company, a corporation, hereby designates the following assignments of error in that certain final judgment of the Court entered in the above entitled cause on February 16th, 1917, in favor of the respondents,

1. In holding that the construction and interpretation given the act of April 28, 1904 (33 Stats. 525), by the respondents in disposing of the relator's application is a possible construction, not strained or far-fetched; and in not reviewing it in this action.

2. In failing to hold that the relator had fully complied with all of the acts of Congress relating to the acquisition of coal lands in the Territory of Alaska and in not requiring by mandamus the issuance of a patent or patents to the coal claims applied for by the relator.

3. In holding that the doctrine of stare decisis, as invoked by the relator, should not be applied in this case.

4. In not holding that the doctrine of stare decisis applies inthis case.

72 5. In overruling relator's demurrer to the return and answer of respondents and in entering final judgment herein in favor of respondents.

6. In failing and refusing to grant the writ of mandamus prayed for herein.
7. Other errors appearing on face of the record.

CHARLES E. SHEPARD,
A. A. HOEHLING, JR.,
JAMES R. CATON,
H.,
Attorneys for Appellant.

Service of copy of the above assignments of error acknowledged this 27 day of February, 1917.

C. EDWARD WRIGHT,
Attorney for Respondents.

Designation of Record.

Filed February 27, 1917.

* * * * * * *

To John R. Young, Esq., Clerk Supreme Court of the District of Columbia.

DEAR SIR: On behalf of the above named plaintiff and appellant, we have the honor to request that you will cause to be prepared a transcript of record on appeal in the above-entitled cause; and we hereby designate the following to be included in said transcript:

1. Petition for mandamus.
2. Rule to show cause.
3. Return and answer of respondents.
4. Demurrer of relator to the return and answer of respondents.

73 5. Opinion of court overruling the demurrer.

6. Order and judgment discharging rule to show cause, and dismissing the petition for mandamus, including the endorsement at the foot thereof of appeal in open court, and order fixing the amount of appeal bond for costs.
7. Assignments of error.
8. Memorandum of approval and filing of bond for costs on appeal.
9. This designation.

HOEHLING, PEELLE & OGILBY,
Attorneys for said Appellant.

Service of copy of above designation acknowledged this 27th day of February, 1917.

C. EDWARD WRIGHT,
Attorney for Respondents.

74 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 73, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59767 at Law, wherein the United States of America, on the relation of Alaska Smokeless Coal Company, is Plaintiff and Relator and Franklin K. Lane, as the Secretary of the Interior and Clay Tallman, as the Commissioner of the General Land Office are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of March, 1917.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3070. The United States of America ex rel. Alaska Smokeless Coal Company, appellant, vs. Franklin K. Lane, Secretary of the Interior, et al. Court of Appeals, District of Columbia. Filed Mar. 8, 1917. Henry W. Hodges, clerk.

Monday, May 7th, A. D. 1917.

* * * * * * *

No. 3070.

THE UNITED STATES OF AMERICA on the Relation of ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, as the Commissioner of the General Land Office.

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Messrs. A. A. Hoehling, Jr., S. C. Peelle, and C. F. R. Ogilby, attorneys for the appellant, and by Messrs. C. D. Mahaffie and C. E. Wright, attorneys for the appellees.

In the Court of Appeals of the District of Columbia.

No. 3070.

THE UNITED STATES OF AMERICA on the Relation of ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, as the Secretary of the Interior, and CLAY TALLMAN, as the Commissioner of the General Land Office.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Appellant corporation filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Interior and the Commissioner of the General Land Office of the United States to issue patents to it for certain coal lands in the Territory of Alaska. On hearing, the court below discharged the rule to show cause and dismissed the petition, from which judgment the case comes here on appeal.

The case turned in the Land Department upon the construction of a provision of the act of Congress of April 28, 1904, (33 Stats. L., 525), as follows: "That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated."

The Secretary, construing this provision of the statute in connection with other acts of Congress relating to the disposition of coal

lands, said: "In construing the provisions of these laws, the Department has held that said acts contemplate as a basis of a valid location the opening and development of a producing mine of coal and that work performed upon a claim merely for prospecting purposes, does not fulfill the requirement. Andrew L. Scofield et al., (41 L. D., 176); John L. Long, (43 L. D., 305); United States vs. Munday, (222 U. S., 175). It appearing from the record in the case, as above stated, that the work performed upon the claims here in question, consists only of shallow surface cuts and openings made merely for prospecting purposes and not for the purpose of the opening or improving of a producing coal mine or mines, it must be held that none of the asserted locations included in the applications affords a sufficient basis for entry and patent under the coal land laws. For these reasons, therefore, and aside from any other reason, the application must be rejected."

Voluminous testimony was taken relating to the development of the mines. Upon this the Secretary was required to pass. Applying the facts to the case, he was called upon to construe the application of the statute. It is clear that this is a case within the jurisdiction of the Secretary, not only as to the determination of the facts, but as to the interpretation of the law applicable thereto. The courts have consistently held, in respect of the powers conferred upon the Secretary to administer the laws relating to the control and disposition of the public lands of the United States, that, so long as he acts within the jurisdiction thus reposed in him, his judgment or discretion cannot be reviewed or controlled by mandamus. The case is ruled by Riverside Oil Co. vs. Hitchcock, 190 U. S., 316; United States ex rel. Ness vs. Fisher, 223 U. S., 683; United States ex rel. Red River Lumber Co. vs. Fisher, 39 App. D. C., 181.

The judgment is affirmed with costs.

Affirmed.

Wednesday, May 16th, A. D. 1917.

* * * * * * *

April Term, 1917.

No. 3070.

THE UNITED STATES OF AMERICA on the Relation of ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, as the Commissioner of the General Land Office.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and

adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice VAN ORSDEL.

May 16, 1917.

Court of Appeals of the District of Columbia, April Term, 1917.

No. 3070.

THE UNITED STATES OF AMERICA ex Relatione ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

Petition for Writ of Error.

Comes now the United States of America, on the relation of Alaska Smokeless Coal Company, plaintiff and appellant in the above-entitled cause, and respectfully shows that, on or about the sixteenth day of May, 1917, the Court of Appeals of the District of Columbia entered a judgment herein in favor of the appellees and against the appellant, affirming the judgment of the Supreme Court of the District of Columbia in favor of said appellees; in which judgment of this court certain errors were committed to the prejudice of the appellant, all of which will more fully and in detail appear from the assignments of error filed with this petition.

The plaintiff and appellant further shows that Section 250 of the Judicial Code of the United States thus provides:

"Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal in the following cases:

* * * * * * *

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

The appellant, (plaintiff), further shows that it is advised by counsel that the judgment of the Court of Appeals of the District of Columbia in this case is subject to review by the Supreme Court of the United States, under the provisions of paragraph five of said section 250 of the Judicial Code, supra, for that there is drawn in question the validity of an authority, as well the existence and scope of power, exercised by the appellees under, and as officers of, the United States, in so construing and interpreting the terms and pro-

visions of a certain act of Congress, approved April 28, 1904, (33 Stat. 525), as to deprive appellant, (plaintiff), of its vested property rights in and to the lands described in the proceedings herein.

The appellant, (plaintiff), further shows that it is advised by counsel that the judgment of said Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph six of said Section 250 of the Judicial Code, supra, in that there is drawn in question by appellees, (defendants), the construction of said act of Congress, approved April 28, 1904, supra, and that said appellees, (defendants), rely upon said act of Congress, and the construction by them placed thereon, as authority for their action complained of in the proceedings herein.

The appellant, (plaintiff), further shows that, by the construction placed by appellees, (defendants), upon said act of Congress, of April 28, 1904, supra, and which construction has been upheld by said decision of this court, the relator has been deprived of its vested property rights in and to said lands; and that there is drawn in question in this suit the validity of an assumed authority exercised by appellees, (defendants), as officers of the United States, as aforesaid.

Wherefore, appellant, (plaintiff), prays, that a writ of error may issue in this behalf out of the Supreme Court of the United States to the Court of Appeals of the District of Columbia, for the correction of the errors so complained of; and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States; and that the mandate of this court be stayed until further order; and penalty fixed for appeal bond for costs.

THE UNITED STATES OF AMERICA *ex Relatione* ALASKA SMOKELESS COAL COMPANY, *Appellant* (*Plaintiff*),
By A. A. HOEHLING, JR., *Attorney*.

Court of Appeals of the District of Columbia, April Term, 1917.

No. 3070.

THE UNITED STATES OF AMERICA ex Relatione ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office.

Assignments of Errors.

And now comes the appellant, (plaintiff), by its attorneys, and says, that in the record and proceedings of the Court of Appeals of the District of Columbia, in the above-entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said appellant, to-wit:

1. In holding that the construction and interpretation by respondents of the act of Congress, approved April 28, 1904, (33 Stat. 525) whereby the application of relator for patent was rejected and denied, is a matter resting solely within the power and jurisdiction of the respondent, Secretary of the Interior, and not subject to review or control by the courts, by mandamus or otherwise.

2. In upholding the action of respondents in construing and interpreting the provisions of said act of April 28, 1904, which authorizes coal locations to be made by persons or associations of persons "who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska," to contemplate and mean, as a basis for a valid location," the opening and development of a producing mine of coal."

3. In upholding the action of respondents in their present and changed construction and interpretation of the provisions of the act aforesaid; and this notwithstanding the fact that the settled construction and interpretation given by respondents to said words "opened or improved a coal mine or coal mines," at the time of the performance of the several acts by relator, and relied upon in the proceedings herein as the basis for patent, was such as operated to invest relator with right to the patent now sought; and which settled construction and interpretation was not changed by respondents until after the performance of said acts by relator and after its rights had attached and vested.

4. In failing to find and hold that relator had fully complied with all of the acts of Congress in relation to the acquisition of coal lands in the Territory of Alaska; and in not requiring, by mandamus, the issuance of a patent or patents to the coal claims applied for by relator.

5. In failing to find and hold that the doctrine of stare decisis applies to the case of relator; and in failing to adjudge and award relief to it accordingly.

6. In failing and refusing to grant to relator the writ of mandamus as prayed for in the petition in that behalf filed in this cause.

7. In affirming the judgment of the Supreme Court of the District of Columbia rendered in this cause, dismissing the petition of relator.

Wherefore, appellant (plaintiff) prays, that, for the errors aforesaid, and other errors appearing in the record of said Court of Appeals in said cause to the prejudice of appellant, the judgment of said Court of Appeals may be reversed, annulled and for naught held; and that said cause, thereupon, be remanded to said Court of Appeals with instructions to reverse the judgment of the Supreme Court of the District of Columbia, in said cause rendered, and further directing the issuance of writ of mandamus as prayed, and for such further proceedings in said cause as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

THE UNITED STATES OF AMERICA *ex Relatione* ALASKA SMOKELESS COAL COMPANY, *Appellant (Plaintiff)*,
By A. A. HOEHLING, Jr., *Attorney*.

(Endorsed:) No. 3070. The United States of America ex rel. Alaska Smokeless Coal Company, Plaintiff and Appellant, vs. Franklin K. Lane, Secretary of the Interior, et al. Petition for writ of Error. Assignments of Error. Court of Appeals, District of Columbia. Filed May 22, 1917. Henry W. Hodges, Clerk.

Friday, May 25th, A. D. 1917.

* * * * * * *

No. 3070.

THE UNITED STATES OF AMERICA on the Relation of ALASKA SMOKELESS COAL COMPANY, Appellant,

vs.

FRANKLIN K. LANE, as the Secretary of the Interior, and CLAY TALLMAN, as the Commissioner of the General Land Office.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said writ issue as prayed, and the bond to act as supersedeas is fixed at the sum of five hundred dollars.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America on the relation of Alaska Smokeless Coal Company, Appellant, and Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as the Commissioner of the General Land Office, Appellees, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 25th day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, The United States of America on the relation of Alaska Smokeless Coal Company, as principal, and United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, in the full and just sum of Five hundred dollars ($500.) to be paid to the said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, their certain attorney, executors, administrators, successors in office or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of May, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said The United States of America on the relation of Alaska Smokeless Coal Company, as plaintiff and relator, and said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, as respondents, a judgment was rendered against the said plaintiff and relator and in favor of said respondents, and the said plaintiff and relator having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The United States of America on the relation of Alaska Smokeless Coal Company, plaintiff and relator, as aforesaid, shall prosecute said writ of error to effect and answer all damages and costs if it fail to

make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNITED STATES OF AMERICA ON THE RELATION OF ALASKA SMOKELESS COAL COMPANY, [SEAL.]
By A. A. HOEHLING, JR., [SEAL.]
Attorney United States Fidelity and Guaranty Company,
By WM. L. SWORMSTEDT, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of—

E. V. ARNOLD.
CHAS. W. LAWTON.
F. TAISHOFF.

Approved by—

CHAS. H. ROBB,
Associate Justice Court of Appeals of the District of Columbia.

[Endorsed:] 3070. The United States of America, on the relation of Alaska Smokeless Coal Company, Appellant, vs. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, as the Commissioner of the General Land Office. Supersedeas Bond on Writ of Error. Court of Appeals District of Columbia. Filed May 29, 1917. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Franklin K. Lane, as the Secretary of the Interior, and Clay Tallman, as the Commissioner of the General Land Office, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America on the Relation of Alaska Smokeless Coal Company, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 29th day of May, in the year of our Lord one thousand nine hundred and seventeen.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 29th day of May, 1917.

C. E. WRIGHT,
Per R. W. PUGH,
Counsel for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 29, 1917. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 56 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of The United States of America on the relation of Alaska Smokeless Coal Company, Appellant, vs. Franklin K. Lane, as the Secretary of the Interior, and Clay Tallman, as the Commissioner of the General Land Office, No. 3070, April Term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of May A. D. 1917.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia,
By MONCURE BURKE,
Assistant Clerk.

Endorsed on cover: File No. 25,982. District of Columbia Court of Appeals. Term No. 1152. The United States of America on the relation of Alaska Smokeless Coal Company, plaintiff in error, vs. Franklin K. Lane, as Secretary of the Interior, and Clay Tallman, as Commissioner of the General Land Office. Filed May 31st, 1917. File No. 25,982.

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In the

Supreme Court of the United States

October Term, 1918

No. 198

THE UNITED STATES OF AMERICA ON THE RELATION OF ALASKA SMOKELESS COAL COMPANY,

Plaintiff in Error,

vs.

FRANKLIN K. LANE, as the Secretary of the Interior, and CLAY TALLMAN, as the Commissioner of the General Land Office,

Defendants in Error.

In Error to the Court of Appeals of the District of Columbia

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT.

This is an appeal from the decision of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District entered on February 16, 1917, dismissing a petition for writ of mandamus to the defendants in error,

which was sought to compel them to issue a patent to a certain group of coal-land claims in the Territory of Alaska. The record consists of the petition for the writ, the rule to show cause, answer of defendants in error, and the demurrer of plaintiff in error (pp. 31 to 34, Transcript of Record). After oral arguments at the bar the presiding justice rendered his opinion, overruling the demurrer, on February 1, 1917, and plaintiff in error electing to stand upon its demurrer, a judgment dismissing the petiton was duly entered on February 16, 1917 (pp. 34 to 40, Transcript of Record). The plaintiff in error gave due notice of appeal to the Court of Appeals of the District of Columbia, filed its assignments of error, and its appeal bond for costs, which was duly approved. Thereafter the cause came on for hearing in the Court of Appeals, and on May 7, 1917, the Court rendered its judgment affirming the judgment of the Supreme Court with costs (pp. 40 to 45, Transcript of Record). Thereafter the plaintiff in error filed its petition for writ of error out of the Supreme Court of the United States to the Court of Appeals of the District of Columbia, and its assignments of error. On May 25, 1917, an order was entered by the Court that writ of error issue as prayed, and that the bond to act as supersedeas be fixed at $500. Thereafter the plaintiff in

error duly filed its bond on writ of error, which was duly approved, and caused a transcript of record to be filed on the 31st day of May, 1917, (pp. 45 to 50, Transcript of Record).

Briefly stated, the case is as follows:

The petitioner is a corporation of the State of Washington, duly qualified to acquire coal lands in Alaska. Large and valuable deposits or mines of coal have existed for unknown ages in that portion of Alaska which is known as the Kayak Recording District in the Juneau Land District. Certain prospectors, in July and August, 1904, each qualified to acquire coal lands in Alaska, after prospecting, discovered, opened and improved mines of coal in said district, staked and named coal-land claims upon the lands where said coal mines were so opened and improved, and filed their notices of location, and these coal-land claims constituted a contiguous group designated as Aurora No. 1 up to Aurora No. 8, and being subsequently surveyed and marked with permanent monuments, conformable to the Act of Congress of April 28, 1904, they aggregated an area of about 990 acres. The notices of location were all duly filed in the Recording District and in the Juneau Land District in due time in the years 1904 and 1905, except that on Aurora No. 7, which, after

the first location and its abandonment, was relocated in 1907. No further attention needs to be paid to this claim, Aurora No. 7, because the petitioner later abandoned it as showing no coal deposits, and also because the relocator had an agreement with his attorney in fact, who was one of the locators, for a share or interest in it, and therefore the petitioner, upon being satisfied of those facts, abandoned that claim and made application for repayment to it by the Government of the deposit for the purchase price. The other seven claims thus left, named and numbered Aurora No. 1 to No. 6 inclusive and Aurora No. 8, still remain a contiguous group, complying in area and dimensions with the act of Congress of May 28, 1908.

In 1909 the petitioner paid to the Treasurer of the United States the statutory price of $10.00 per acre, made application for the issuance of a patent to it, and then tendered to the then Secretary of the Interior proofs of compliance with the statute and regulations of his Department concerning coal claims upon unsurveyed lands in Alaska.

After investigation and by order of the Commissioner of the General Land Office, proceedings were instituted against the locators and the relator upon four charges, which are in substance:

1. That the locators did not make their respective locations and filings for their own sole benefit, but each prior thereto agreed with one Feed, who was one of the locators, that he should receive an interest in the location, contrary to law.

2. That each locator did not make his location and filing in good faith and with the intent that he alone should receive the benefit of it, but did it under an unlawful agreement with Feed, whereby the entries and locations were to be made in the interest of Feed and various other persons or corporations unknown to the General Land Office.

3. That each locator did not locate and file in good faith, and with the intent of acquiring title for his sole and individual use, but each location was made with the unlawful purpose and intent that the title should inure in equal measure to all of the eight locators, or to the use of an association or corporation by them to be formed with such others as they might admit thereto.

4. That none of the locators prior to location or filing opened or improved any mine or mines of coal upon any of the parcels so located.

The charges are set forth textually at pages 7 and 8 of the Transcript of Record herein.

Voluminous testimony was taken at sundry places in the United States and in Alaska, at which the locators and the Government were represented by counsel, and on hearing before the Register and Receiver of the Land Office at Juneau those officers decided, on June 15, 1914, that the Government had failed to sustain charges Nos. 1, 2 and 3 as to any of the seven claims; "and that no mine or mines of coal within the meaning of the Alaska Coal Land law was or had been opened or improved upon any of the claims" (p. 9, Transcript of Record); and hence Charge No. 4 had been sustained as to all of the seven claims, and for that reason only they recommended that the application for patent be rejected as to all the claims. The decision of said Register and Receiver, in so far as it covers the fourth charge, is set forth verbatim on pages 9 to 14 of the Transcript of Record herein, and therein they quote in considerable detail the evidence as to the openings made on the different claims.

In the decision of the Register and Receiver appears the following statements:

> "The following openings appear to have been made on the several claims as they are mentioned, in 1904, made generally by Beck and Asbjornsen:
>
> "Aurora No. 1. Several places near the west line opened so that the vein was exposed, the vein being three or four feet thick.

"Aurora No. 2. A vein six or seven feet thick dug into so that the vein was exposed, from which according to Asbjornsen, coal could have been mined. The witnesses unite in asserting that the coal on this claim is of commercial value.

"Aurora No. 3. A three foot vein of coal well to the north on the west line, three feet thick. Openings to the east of the east line and to the south of the south line at southeast corner showing veins that probably dip into the claim. The southeast corner only of the claim shows the coal bearing formation.

"Aurora No. 4. Veins showing coal about three feet thick near the center of the claim opened up in two different places. The coal was dug across the face. Other openings on this claim, by whom made not certain, show veins 9, 10, 10½ and 15 feet.

"Aurora No. 5. A vein four or five feet thick was opened containing good coal which could have been mined out of the opening made, according to Asbjornsen. On this claim two large workable veins were found in 1906 by T. P. McDonald. Witness G. A. Kennedy found four workable veins.

"Aurora No. 6. A vein of three to four feet was opened up from which coal could have been taken out. In 1906 T. P. McDonald saw four openings on this claim showing coal five and six feet thick. Witness G. A. Kennedy testified that one of these veins was a valuable vein.

* * * * * * * * * * *

"Aurora No. 8. A vein opened showing coal three or four feet thick" (p. 11, Transcript of Record).

and

"There is no serious doubt but that on all of the claims excepting the Aurora No. 7, pits or open cuts or veins that in some measures could be worked, perhaps at a loss, are to be found.

"The defense has sought to show that prior to the location of these claims the qualification of the locator in opening or improving a coal mine is not the qualification now required of the same locator and has appealed to the rule to abide by the cases formerly adjudicated.

"The liberal spirit of the requirements of the Department under the General Coal Land Laws comes of what may be termed a policy, to permit the man of small means as well as the man of better circumstances, to become a beneficiary thereunder and is due also to the fact that the opening and improving of a coal mine under the general law secures only a preference right, a right of entry yet remaining under Section 2347.

"Under this policy and because of the presence of Section 2347 in the general law, good faith and the large play of this qualification of the locator has become almost a controlling force in the adjudicated cases, which often show improvements no greater in extent and value than appear in this case and of like character. The qualifications given in rule three in the foregoing, have been developed not only from a construction of the statute but also from the effort of the adjudicating officer to determine whether the 'labor expended and improvements made' are 'such as to clearly indicate the good faith of the claimant.' Under the 1904 act there is not the assistance derived from Section 2347 permitting a larger controlling influence of the good faith as it appears in

the improvements themselves. There is not then, such a common statutory intent expressed in the general law and the Act of 1904 as will permit an adjudication under the rule of *stare decisis* even if it be conclusively shown that the qualification formerly defined is not what is now sought to be exacted of the locator.

"The absence of any well expressed intent to mine the coal, the intent, such as it appears, to prospect the claims rather than to develop paying mines, the failure to show clearly in the labor expended and improvements made a qualifying intent, or to show that such work or improvements was potentially capable of becoming part of the operating plan of a producing mine and that the steps therein taken were substantial and looked to the creation of an operating and producing mine are all matters of evidence submitted which sustain charge four, as to all of the claims.

"It is accordingly recommended that the application be rejected and the locations be declared invalid" (pp. 13, 14, Transcript of Record).

The Government did not appeal from the decision against it as to Charges Nos. 1, 2 and 3, and the relator and locators did appeal to the Commissioner of the General Land Office from said decision as to Charge No. 4. Upon hearing before the Commissioner, on the same evidence submitted to the Register and Receiver, that official rejected the application on the same grounds (pp. 15 to 20, Transcript of Record), and in his decision also quoted considerable testimony. His decision is

quoted in full, with the exception of the four charges, on pages 15 to 20 of the Transcript of Record. He says:

"However, all that was done by any was to find coal veins, open it up to a slight extent so as to expose same where not already exposed by nature or the effect of the elements.

"The small amount of work done on these claims and the small amount of expenditure made therefor as shown by the testimony and as alleged and set forth in the coal declaratory statements and the application for patent, towards opening and improving a coal mine or mines on the lands involved, at the most, scarcely places this case on a par with the Willoughby case decided adversely to the claimants by this office, December 31, 1914, or the Wardell case also decided against the claimants by this office, which decision was sustained by the Department on June 24, 1914, and the work alleged and shown herein is of the same general nature and extent.

"In the *Wardell* case, it was found:

" 'That the work done upon the claim here under consideration was merely prospecting, and did not constitute the opening or improving a mine of coal as contemplated by the act of April 28, 1904 (*supra*), as a basis for the right to locate and enter unsurveyed coal lands in Alaska,' and the work done and expenditures made herein, are vastly less than in the *Scofield* (Cunningham) case, 41 L. D., 176, and other cases decided adversely to the claimants on the question of sufficiency of work to constitute the opening and improving a coal mine or mines under the acts governing.

Therefore, your conclusion that charge No. 4 has been sustained by the Government is cor-

rect and affirmed as to all the claims involved herein" (p. 19, Transcript of Record);

and

> "After careful consideration of the record, no sufficient reasons appear for disturbing your (the Register's and Receiver's) finding that charges Nos. 1, 2 and 3 were not sustained as to any of the claims, except Holck's (Aurora No. 7), and that as to that claim, charges Nos. 2 and 3 were not sustained, but charge No. 1 was sustained and proved" (p. 20, Transcript of Record).

Appeal was taken in due order from the Commissioner to the Secretary of the Interior, but no appeal was taken in behalf of the United States on that part of the decision which was adverse to it. The Secretary, after hearing and argument, also rejected the application, and later overruled a motion for a rehearing on the ground of errors in law. His decision is set forth verbatim at pages 21 to 27 of the Transcript of Record.

The Secretary in his decision, after setting out in full Section 1 of the Act of April 28, 1904, and Section 1 of the Act of May 28, 1908, says:

> "These acts, therefore, make provision for the sale only of unsurveyed coal lands in Alaska, in rectangular tracts containing 40, 80 or 100 acres, upon which a coal mine or coal mines have been opened or improved and included in valid locations made prior to November 12, 1906, or in accordance with the departmental instructions of May 16, 1907. In construing the pro-

visions of these laws, the Department has held that said acts contemplate as a basis of a valid location the opening and development of a producing mine of coal and that work performed upon a claim merely for prospecting purposes, does not fulfill the requirement. *Andrew L. Scofield et al.* (41 L. D., 176); *John L. Long* (43 L. D., 305); *United States vs. Munday* (222 U. S., 175).

"It appearing from the record in the case, as above stated, that the work performed upon the claims here in question, consists only of shallow surface cuts and openings made merely for prospecting purposes and not for the purpose of the opening or improving of a producing coal mine or mines, it must be held that none of the asserted locations included in the application affords a sufficient basis for entry and patent under the coal land laws. For these reasons, therefore, and aside from any other reason, the application must be rejected.

"The decision of the Commissioner is accordingly affirmed" (p. 27, Transcript of Record).

The petition then sets forth the work which was done and improvements made on each of the seven claims (p. 28, Transcript of Record), and states that "all of said coal claims contained coal and were classed by the officials of the Government as coal lands." It shows the aggregate expenditure of $3,444.76 by the locators and relator on the group.

At no stage of the proceedings has any question been raised as to strict compliance with all technical requirements of the statute and departmental regu-

lations; and the sole controversy is whether the locators have "opened or improved mines of coal."

Upon the facts thus summarized, the relator applied for a writ of mandamus to the respondents, requiring them to approve and pass to patent its application.

A rule to show cause was issued according to the usual practice, and the respondents' answer set up in brief that they are constituted by law sole disposing agents of the Government in the administration of public lands; that Congress has committed exclusive jurisdiction to them to determine the validity of all claims for lands and to hear and determine all questions of fact involved in the presentation thereof, and to determine whether the applicant, on the facts presented, has complied with the law, and the exercise of that jurisdiction involves judgment and discretion. Therefore, they averred that after considering all the evidence and applying the law thereto, and after hearing in due course, they determined that the locations were invalid "in that the locators and claimants had not opened or improved any mine or mines of coal on any of the land in controversy, within the meaning of and as required by the act of April 28th, 1904," and therefore the application was rejected, as the relator was

not entitled to purchase the land (pp. 31 to 32, Transcript of Record).

To this answer the relator demurred as bad in substance, and that it does not set forth any substantial or legal defense (p. 33, Transcript of Record).

The relator, with its demurrer, also filed a statement that the matters of law intended to be argued in support of the demurrer are, that the respondents in rejecting its application erred in matter of law and without dispute in matters of fact between the Government and the relator, as follows:

1. That they have held that the relator is not entitled to patent under the acts of Congress.

2. That they have held that the relator and its grantors have not opened or improved a mine under the acts of Congress.

3. That they have held that the word "mine," under the acts of Congress, designates a developed coal property, or one prepared and ready for commercial exploitation, and not the body of mineral produced by nature and existing in or under the surface of the land.

4. That they have held that they are not bound by, and that their acts are not under the control of,

the decisions of the courts, as to matters of law, and the construction of acts of Congress relative to the public lands, but the applicants for patents are subject to their uncontrolled and arbitrary discretion and judgment.

5. That they have held that the relator's rights are not determined by the established and settled course of decision in the Federal courts, and in the decisions, rulings, and practice of the Interior Department on applications for patent and the required conditions of procuring the same as they existed when the locators and grantees took the several steps set forth in their petition; and that the relator and its grantors thereby acquired no vested rights, but their rights are controlled by the rulings of the Department, as they have been changed since the locations.

6. That the relator, by virtue of the locations and other steps, is entitled to a patent conveying fee-simple title.

7. That there is no good or sufficiently legal reason set forth in the answer why a patent to seven coal claims should not issue to the relator.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigned the following errors in the judgment of the Court of Appeals of the District of Columbia:

1. In holding that the construction and interpretation by respondents of the act of Congress, approved April 28, 1904, (33 Stat. 525), whereby the application of relator for patent was rejected and denied, is a matter resting solely within the power and jurisdiction of the respondent, Secretary of the Interior, and not subject to review or control by the courts, by mandamus or otherwise.

2. In upholding the action of respondents in construing and interpreting the provisions of said act of April 28, 1904, which authorizes coal locations to be made by persons or associations of persons "who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the District of Alaska," to contemplate and mean, as a basis for a valid location, "the opening and development of a producing mine of coal."

3. In upholding the action of respondents in their present and changed construction and interpretation of the provisions of the act aforesaid; and this notwithstanding the fact that the settled construction and interpretation given by respondents to said words "opened or improved a coal mine or coal mines," at the time of the performance of the several acts by relator, and relied upon in the proceedings herein as the basis for patent, was such as operated to invest relator with right to the patent now sought; and which settled construction and interpretation was not changed by respondents until after the performance of said acts by relator and after its rights had attached and vested.

4. In failing to find and hold that relator had fully complied with all of the acts of Congress in relation to the acquisition of coal lands in the Territory of Alaska; and in not requiring, by mandamus, the issuance of a patent or patents to the coal claims applied for by relator.

5. In failing to find and hold that the doctrine of *stare decisis* applies to the case of relator; and in failing to adjudge and award relief to it accordingly.

6. In failing and refusing to grant to relator the writ of mandamus as prayed for in the petition in that behalf filed in this cause.

7. In affirming the judgment of the Supreme Court of the District of Columbia rendered in this cause, dismissing the petition of relator (pp. 46 to 47, Transcript of Record).

All of the assignments may be comprehended under two heads as follows:

I.

The locators opened or improved a coal mine or coal mines on each of their respective locations under the coal land laws as the same then existed, and under the then settled construction of those laws, and they and the relator have otherwise complied with the law; therefore the relator is entitled to a patent to the lands so located.

II.

It was the absolute legal duty of the respondents (defendants in error) not qualified by any official discretion to find and hold that the locators had opened or improved a coal mine or coal mines on their respective claims, and to issue a patent therefor to the relator (plaintiff in error). This duty was purely a ministerial duty, and is enforceable by mandamus.

ARGUMENT.

The jurisdiction of this court arises out of the fact that the construction of a statute of the United States and the duty of the Secretary of the Interior thereunder are drawn into question. The statute contains the following provisions in the Act of April 28, 1904, entitled "An Act To amend an Act entitled 'An Act to extend the coal-land laws to the district of Alaska' approved June sixth, nineteen hundred.", Chap. 1772, 33 Stat. at L. 525:

In Section 1:

> "That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated. * * *"

Also Section 2 of the same Act:

> "That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor,

> accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for * * *."

And Sec. 1 of the Act of May 28, 1908, entitled "An Act to encourage the development of coal deposits in the Territory of Alaska.", Chap, 211, 35 Stat. at L. 424:

> "That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase, not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made. * * *"

The general coal land laws of the United States are embraced within Sections 2347 to 2352 of the Revised Statutes.

Section 2347 reads:

"Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre, for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

And Section 2348 provides:

"Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements."

The Act of June 6, 1900, entitled "An Act to extend the coal land laws to the District of Alaska" 31 Stat. at L. 658, provides:

> "That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes."

The facts are not in dispute. No question is raised as to a strict compliance by the locators and relator with all the requirements of the statute and the regulations of the Department. The proceedings instituted by the Department against the locators and the relator upon the charges of bad faith and fraud were not sustained, and the Department has expressly so held (pp. 9, 20, 21, Transcript of Record). Thus the sole question under the statute is "Did the locators open or improve a coal mine or coal mines?" It is plain from the statute that if the locators have "opened or improved a coal mine or coal mines" the relator is entitled to a patent to the lands upon which such coal mine or coal mines are located. The language of the statute is "That such locator or locators, or their assigns, * * * shall receive a patent to the land located * * *." The statute absolutely fixes the right of the locator and commands the recognition of that right.

I.

The locators opened or improved a coal mine or coal mines on each of their respective locations

under the coal land laws as the same then existed, and under the then settled construction of those laws, and they and the relator have otherwise complied with the law; therefore the relator is entitled to a patent to the lands so located.

A.

The validity of these claims must be adjudicated in accordance with the settled construction of the coal land law as it obtained at the time of the location of the claims and the initiation of the respective rights of the locators thereto.

All of these claims were located in 1904, and all of the openings and improvements on the coal mines therein were made prior to November 12, 1906.

We earnestly contend that the acts of the locators in opening or improving coal mines must be tested by the law as it existed at that time and not by the law as it may have been subsequently construed.

The rule of *stare decisis* is uniformly recognized by the Department of the Interior, as well as by the Courts in cases interpreting departmental rules and practice and construing acts of administrative officers of the Government.

The decisions, rules, regulations and instructions of the Department of the Interior interpreting the statute have the force of law and are the law at the time they are rendered or promulgated, and continue to be the law until modified, overruled, repealed or amended. The locators had the right to rely upon such decisions, rules, regulations and instructions interpreting the coal land laws as were in force at the time they initiated their claims, and their rights so acquired cannot be affected, modified or divested by subsequent decisions, rules, regulations or instructions. This doctrine has been adhered to by the Department and by the Courts from the beginning.

In the case of *Cudney vs. Flannery*, 1 L. D. 165, which was the first reported decision on the point, the Secretary, discussing the opinion of the Commissioner, says:

> "The regulations and rules of your office and of this Department in force at the date of Flannery's entry *had the force of law* as respected a tract subject to entry * * *. He thereby acquired rights which cannot now, *legally or equitably*, be repudiated, * * * even though such an entry might not now be allowed. The later rulings cannot have this retroactive effect."

This doctrine had previously been announced by the Secretary's unreported decision of July 17,

1873, in the case of *Missouri, Kansas & Texas Railroad Co. vs. Buck.*

This doctrine was followed in the important case of *Miner vs. Marriott,* 2 L. D. 709. The Department held in changing a former ruling that:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with or pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal."

The ruling in *Miner vs. Marriott* was quoted with approval in the case of *Milne vs. Ellsworth,* 3 L. D. 213, the Department saying:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office * * *. She is in a position to plead this protection, because she acquired the incipient right to the land in contest while the ruling was in force."

In the case of *Henry W. Fuss,* 5. L. D. 167, the Secretary says:

> "The regulation of your office which recognized the right of assignment had, until revoked or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected."

In that opinion, to support the decision, the following cases are cited:

Miner vs. Marriott, 2 L. D. 709;

Robb's Lessee vs. Irwin, 15 Ohio 703;

Ohio Life & Trust Co. vs. Debolt, 16 Howard 432;

Gelpcke vs. City of Dubuque, 1 Wallace 206.

In the case of *Oliver vs. Thomas*, 5 L. D. 289, Secretary Lamar says:

> "The Thomas entry, therefore having been made and allowed under the rulings then in force, and not being in conflict with the law as then interpreted should be allowed to stand. The entryman complied with all the regulations of the Department in the matter of his entry and he should not be prejudiced now, because those regulations have been changed. 1 *Kent's Com.* 476, *Brown vs. U. S.*, 113 U. S. 568 and cited cases."

This same doctrine was followed in the cases of

Watts vs. Forsyth, 5 L. D. 624;

Williams vs. Leow, 12 L. D. 297.

In *James B. Weaver*, 35 L. D. 553, Secretary Garfield says:

> "Commutation entries thus made were allowed under authority of the land department, and rights arising thereunder should not be disturbed by reason of a later construction of the law. Especially is this true where it appears

that, relying upon the former construction, and entry allowed thereunder rights of third parties have intervened that cannot be protected if action taken under the former construction is to be ignored."

In the case of *Roy McDonald,* 36 L. D. 205, it was held, after discussing the decision of this Court in *United States vs. Alabama Great Southern Ry. Co.,* 142 U. S. 615, that:

"The decisions clearly show that sudden changes in the construction of statutes, by those charged with their enforcement, are looked upon with disfavor, especially where a construction favorable to the individual has been acted upon and the change is made in such a manner as to become retroactive."

And

"This being so, upon what reasonable ground can all possible protection be denied those similarly situated—that is, those who had perfected location under the previous decision prior to the change in construction of the statutes, but whose claims by mere chance had not been reached for patent at the date of the *Simpson* decision? The equities of the two cases are surely equal."

In *Oliver vs. Bates,* 36 L. D. 423, Assistant Secretary Pierce says:

"In the administration of Public Land Laws it has occurred that constructions placed upon those laws by this Department have in some instances upon further consideration or because of decisions of the court occurring in the meantime, have changed and questions

necessarily have arisen as to the right and protection to be accorded those acting under the earlier construction. In the case of *Roy McDonald* (36 L. D. 205, 209) a condition of this sort was presented and therein it was said after a review of the authorities:"

He then quotes from the case of *Roy McDonald, supra,* and proceeds:

"From what has been said heretofore it is clear that Bates at the time of his settlement was, under the construction then prevailing, qualified to initiate a claim under the homestead laws, and under the provisions of the act of May 14, 1880 (21 Stat. 140), such a claim might be initiated by a settlement made upon unsurveyed lands."

"It is the opinion of the Department upon a full and careful consideration of the matter that the decisions of Nov. 23, 1907, and Feb. 19, 1908, heretofore rendered in this case, were in error in applying the later ruling under which Bates was disqualified from further asserting claim under the public land laws * * *."

See also

Bertram C. Noble, 43 L. D. 75;

Fisher vs. Heirs of Rule, 43 L. D. 217.

The present Secretary recognizes the principle announced in the above cases in the unpublished instructions governing homesteads in the former Siletz Indian Reservation in Oregon, wherein it is stated:

"In consideration of the subject it must be

remembered that the general Homestead Law in force at the time these entries were made and at the time of the passage of the Law of 1911, did not undertake to specify the amount or character of cultivation required to be made upon homestead claims * * *. With respect to cultivation it must be borne in mind that during the period precedent to March 4, 1911, rather liberal holdings had been made with respect to the requirements of the cultivation of homestead claims, the difficulties which entrymen met in cultivation of their claims because of the physical or other conditions of the land, being given weight in determination of the question as to whether cultivation met the requirements of the law. Later the Department adopted a more rigid rule of administration with respect to the showing required of homesteaders, both as to cultivation and as to residence * * *. These cases should be adjudicated in the light of the law and practice in force prior to March 4, 1911." *Siletz Indian Lands,* 42 L. D. 244.

This is all the plaintiff in error is contending for. If the court will apply to the case at bar the rule laid down in this instruction of the Commissioner we are content.

The latest ruling by the present Secretary on this question was on December 26, 1913, in *Rough Rider et al Lode Mining Claims,* 42 L. D. 584. A group of mineral claims had been canceled after having been passed upon by the Commissioner of the General Land Office. An appeal was taken to the Secretary of the Interior and the decision of the

Commissioner was affirmed. After the claims had been canceled a petition was filed to recall and vacate the Departmental Decision and reinstate the cases. In finally reversing the finding of the Commissioner the Secretary says:

> "It was upon showings such as this that entries and patents were allowed for mining claims in this region at the dates of the locations and entries of the claims here involved. There can be no question, therefore, that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the Land Department than that applied by the Department with respect to the claims here in question in its decision of Jan. 31, 1911, and that had said earlier rule been followed with regard to these locations they would, in the absence of other objections, have passed to patent. *This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of the opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice of the owners of the claims, but, on the other hand, that the said previous and long continued practice of the Land Department established a rule of property with respect to such claims which should have been adhered to and followed in the determination of this case.*"

This opinion was signed by First Assistant Secretary Jones, who signed the opinion in the case involving the claims now before the Court. This decision sets forth exactly the proposition that we

are contending for, and the circumstances of the *Rough Rider* case are almost identical with the case at bar.

In addition to an unbroken line of land decisions, establishing the policy of the Department of the Interior to adjudicate all cases according to the construction given the law at the time of the initiation of the rights, we find a long line of decisions of the courts, interpreting departmental rulings and practice, adhering to the same doctrine.

In the case of *United States vs. Alabama Great Southern Ry. Co., supra,* this court says:

> "We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, *if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should* be changed in such a manner as to become retroactive."

In the case of *United States vs. McDaniel*, 7 Peters 1, the court held:

> "* * * Usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usage can have a retrospective effect, but must be limited to the future."
>
> "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

In the case of *Robertson vs. Downing*, 127 U. S. 607, the court states:

> "This construction of the Department has been followed for many years, without any attempt of Congress to change it, or of any other department of the Government to question its correctness, except in the present instance. The regulation of a Department of the Government is not of course to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjudicated, it is not to be disregarded without the most cogent and persuasive reasons."

See also

Edwards' Lessee vs. Darby, 12 Wheaton 206;

Peabody vs. Draughn, 83 U. S. 240;

United States vs. Pugh, 99 U. S. 265;

United States vs. Philbrick, 120 U. S. 52;

United States vs. Hill, 120 U. S. 169;

Merritt vs. Cameron, 137 U. S. 542;

Howe vs. Parker, 190 Fed. 738.

The executive order of November 12, 1906, withdrawing Alaska coal lands from entry, was modified on January 15, 1907, as follows:

> "Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal land laws and existent at the date of such withdrawal."

This court in the case of *Gelpcke vs. Dubuque,* 1 Wall. 175, *supra,* has established the principle in constitutional law that rights acquired under a given condition of case law in the State courts cannot be impaired by a later change in the course of decisions, any more than by a change in statutory law. The same principle is equally obligatory on the Government of the United States and on each of its departments and officials.

B.

The work done by the locators on these claims constituted the opening or improving of a coal mine or coal mines thereon.

We have shown that the relator is entitled to

have its rights adjudicated in accordance with the settled construction of the coal land laws as it obtained prior to November 12, 1906. It now remains to ascertain whether or not under that same construction the work performed by the locators as shown by the record herein constituted the opening or improving of the coal mines therein contained.

The record herein discloses no dispute between the parties as to any question of fact.

On page 11 of the Transcript of Record is set forth the work done in 1904 on each of the seven claims as found by the Register and Receiver in their decision, and is as follows:

> "The following openings appear to have been made on the several claims as they are mentioned, in 1904, made generally by Beck and Asbjornsen:
>
> "Aurora No. 1. Several places near the west line opened so that the vein was exposed, the vein being three or four feet thick.
>
> "Aurora No. 2. A vein six or seven feet thick dug into so that the vein was exposed, from which according to Asbjornsen, coal could have been mined. The witnesses unite in asserting that the coal on this claim is of commercial value.
>
> "Aurora No. 3. A three foot vein of coal well to the north on the west line, three feet thick. Openings to the east of the east line and to the south of the south line at southeast corner showing veins that probably dip into the claim. The southeast corner only of the claim shows the coal bearing formation.

"Aurora No. 4. Veins showing coal about three feet thick near the center of the claim opened up in two different places. The coal was dug across the face. Other openings on this claim, by whom made not certain, show veins 10, 10½ and 15 feet.

"Aurora No. 5. A vein four or five feet thick was opened containing good coal which could have been mined out of the opening made, according to Asbjornsen. On this claim two large workable veins were found in 1906 by T. P. McDonald. Witness G. A. Kennedy found four workable veins.

"Aurora No. 6. A vein of three to four feet was opened up from which coal could have been taken out. In 1906 T. P. McDonald saw four openings on this claim showing coal five and six feet thick. Witness G. A. Kennedy testified that one of these veins was a valuable vein.

* * * * * * * * * * *

"Aurora No. 8. A vein opened showing coal three or four feet thick."

The petition for the writ herein sets forth the fact that all of said work had been done and concludes in Paragraph XIV thereof:

"All of said coal claims contained coal and were classed by the officials of the Government as coal lands. All of said locators, except said Ole M. Holck, did said work and expended money in so doing, prior to November 12, 1906, in good faith and for the purpose of acquiring said lands as coal lands, under the statutes of the United States and the rules and regulations of the Interior Department, and of entitling themselves to acquire the same; and said locators, their said assigns and the relator in all have expended in opening said coal mines and

in surveying said coal claims preparatory to further work and development and to application for patent, the aggregate sum of thirty-four hundred, forty-four and 76/100 ($3444.76) dollars" (p. 28, Transcript of Record).

We contend that the correct interpretation of the term *"open* AND *improve any coal mine or mines"* as used in Section 2348 of the Revised Statutes, and the term *"opened* OR *improved a coal mine or coal mines"* as used in the Act of April 28, 1904, and as construed by the Department at and prior to the time these claims were initiated, was the actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal, which is the coal mine.

The attention of the court is directed to the difference in the language employed by Congress in these two statutes. Section 2348 of the Revised Statutes (being a part of the general coal land laws) provides:

> "Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved;"

while Section 1 of the Act of April 28, 1904, provides:

> "That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated."

We shall now examine the instructions and decisions of the Land Department construing Section 2348 of the Revised Statutes as above set forth.

In 1 L. D. 687 the rules and regulations which were promulgated by the Department for the interpretation of Section 2348 R. S., and following section, provide:

> "The opening and improving of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant."

What is the meaning of these rules and regulations? They mean that the claimant must actually do or perform some act of opening and improving a mine. By actually expending labor and making improvements his good faith is indicated. These rules and regulations do not pretend to define what a "mine" actually is, but go rather to the question of "good faith," which is distinguished from "matters of form." *The opening and improving of a*

mine is not a "matter of form" where labor is expended and improvements made in good faith.

In the case of *Watkins, et al. vs. Garner,* 13 L. D. 414, decision by Secretary Noble, dated October 16, 1891, it was held:

> "Garner's statement was filed February 10, 1888, alleging that he came into possession of said tract on January 20, 1888, and had since remained in possession continuously, and that he had then expended in labor and improvements on said land, the sum of $45—*that he had exposed a vein of coal by digging into the hill six feet, said opening being eight feet wide and six feet high.* * * * * * *
>
> "In this statement he was corroborated by other witnesses on the hearing, so that the evidence is satisfactory that he had 'priority of possession and improvement followed by proper filing,' and to this extent that he had complied with the law. But it is contended that he did not show that 'continual good faith,' which is necessary to establish his preference right.
>
> "He testified that from February 6, 1888, till he offered to prove up, he either worked himself on the tract, or hired others to work for him, that he expended $400 in labor and improvements, that he opened several drifts on each half of the land, exposing valuable veins of coal, and that he had done all his means and ability would justify, * * * In this he was corroborated by his other witnesses.
>
> "The burden of proof was upon the protestants to show that Garner failed to comply with the law. In the opinion of the local officers, the protestants did not show this, and you

concurred in that opinion. Garner's 'continued good faith' has thus been established by the concurring opinions of the local officers and yourself * * *"

The opinion then quotes from *Helen E. Dement*, 8 L. D. 639, as follows:

> "* * * *It is right and proper to take into consideration 'the degree and condition of life of the entryman' in determining whether the improvements show good faith,"*

and continues:

> *"This principle is applicable to entries under the coal land law, or else only the man of ample means can enter coal lands. This is not the policy of the Government."*

It appears that Garner was a farmer living 24 miles from the claim and did all that was possible under the conditions. *The exposing of a vein of coal by digging into the hill six feet, said opening being eight feet wide, by six feet high, constituted the opening and improving of a mine sufficient to initiate his right. The subsequent work went to the question of good faith. The degree and condition of life of the entrymen also went to the same question.*

McGillicuddy vs. Tompkins, et al., 14 L. D. 633, opinion by Secretary Noble, dated June 14, 1892, turned upon the question of whether there had been actual discovery and an opening of the coal measure. It was held:

"The land contained no outcropping or other surface indications of coal and none was discovered in the shaft described in the applicant's filing. Said filing was therefore properly found void. * * *"

The next case passing upon this question is *Paire vs. Markham,* 21 L. D. 197, by Secretary Smith, dated September 24, 1895.

Markham filed his coal declaratory statement November 28, 1892, at 10 A. M., alleging possession November 24th preceding, and on November 28th, at 11:35 A. M., Paire filed for the same land, alleging possession November 1st preceding.

There was some dispute as to whether all of Markham's work was on the tract, but it was agreed that Markham thought it was and acted in good faith in this respect. The Secretary says:

"In my view of the issue this is immaterial as it is conceded that he did do work within the true boundaries and did have a discovery of coal there. It is true it is not an extensive working, *and perhaps there is not disclosed therein a vein of coal that would pay for working. Yet the work has been done and coal has been found by him.* All that the *law and rules require* in opening and improving a coal mine is that 'the *labor expended* and *improvements* made *must be such as to clearly indicate the good faith of the claimant' and not a mere matter of form.*"

Notwithstanding Paire had done the greater amount of work, Markham was given the land be-

cause of prior work in the matter of opening a coal mine.

Here is expressed the exact interpretation of the rules and regulations in 1 L. D. 690 governing Section 2348 that we have contended for.

It is clear that the Secretary contradistinguished "matters of form" and of "good faith," and the question whether a mine has been opened and improved depends largely upon which element is shown. Markham had done some work. The record shows that it was very little, but he had excavated the earth and found a coal vein, and it was questionable whether it was on the claim, but it was a sufficient showing of "good faith."

"Matters of form" relate merely to technically complying with the law without affecting the substance. Simply filing the necessary documents, or possibly seeing an exposed cropping of coal on the ground, would be considered as a "matter of form" as distinguished from actually excavating the earth so as to expose a vein of coal.

The case of *Reed vs. Nelson,* 29 L. D. 615, by Secretary Hitchcock, dated March 19, 1900, shows the consistent attitude of the Department as expressed in the foregoing cases construing the coal land laws. This opinion was written for the Sec-

retary by Mr. Justice Van Devanter, then Assistant Attorney General.

On May 3, 1897, Reed filed his coal declaratory statement for 160 acres of land, and later proceeded to prospect for coal. Some three months after he made his filing he drilled through a vein of coal 6 feet 4 inches in thickness at a depth of 218 feet, and expended the sum of $170.00.

Nelson first went upon the land on May 13, 1897, and staked the land on May 19th. *An open cut was run a short distance,* and then a shaft sunk disclosing a 4 foot vein of coal.

On May 22d Nelson filed his coal declaratory statement.

The Secretary says:

> "From these extracts it clearly appears that *the right to purchase coal lands is initiated by the actual discovery of coal on the land and the performance of some act of improvement sufficient to give notice to the world of an intent to purchase such lands as coal lands.* The right to purchase such lands cannot be initiated by the filing of a declaratory statement therefor. In case of conflicting claims to coal lands the preference right is determined, not by the date of the filing of the declaratory statements, (unless, indeed, the prior possessor has filed his declaratory statement out of time) but by priority of possession and improvement."
>
> "* * * On May 19, 1897, Nelson un-

covered a four-foot vein of coal on the forty acres north of the tract here in dispute, that is, on a portion of the one hundred and sixty acres for which he filed his declaratory statement. This was prior to any discovery made by Reed * * *."

"It thus appears that apart from any consideration of the discovery and development made by Nelson on May 13, 1897, on what he supposed to be the tract here in controversy but which proved to be on the Zeilinger tract, *Nelson's right was initiated by the DEVELOPMENT ON MAY* 19, 1897, *OF A FOUR FOOT VEIN OF COAL ON A PORTION OF THE ONE HUNDRED AND SIXTY ACRES CLAIMED BY HIM;* that this development and improvement was promptly followed by the filing of his declaratory statement, which included the tract in dispute; that Reed gained no right by the filing of his declaratory statement on May 3, 1897, before he had discovered or developed coal on this land; and that at the time he initiated his claim by the actual development of coal on the land Nelson's right had already attached to the tract in dispute."

"There is no question as to the character of the land in controversy. Both parties assert that it is more valuable for coal than for any other purpose, and the evidence bears out this assertion."

It is very clear from an examination of this case that the excavation of the earth so as to "DISCLOSE A FOUR FOOT VEIN OF COAL" was sufficient to satisfy the Department that there had been opened and improved a mine to comply with the requirements of the coal land law, and

Nelson's right to the claim was thereby initiated. No other interpretation can be placed on this decision.

In this decision "discovery" is made synonymous with "opening" and from this statement it appears that if Reed had discovered coal and performed some act of improvement before filing his coal declaratory statement, it would have given him the preference right over Nelson.

The foregoing cases represent the unbroken line of authorities as laid down by the Department from 1873 to the time the claimants in this case initiated their entries.

We submit that a mere reading of the record herein will show that the work done and acts performed by the locators in opening and improving the mines involved in this proceeding were far more extensive than was the work done in the above cases, where the Department held there had been a compliance with the statute as then construed.

Surely if Garner (in *Watkins vs. Garner, supra*) opened and improved a coal mine the locators here opened and improved coal mines. If Markham (in *Paire vs. Markham, supra*) showed good faith by working outside the boundaries of his own tract, believing he was working within such boundaries,

can it be said under such a construction of the statute that the locators here did not show good faith? The Department said, *"yet the work has been done and coal has been found by him (Markham)."* In the case at bar the work has been done *on the land located* and *coal has been found by the locators.* Then finally Secretary Hitchcock (in *Reed vs. Nelson, supra*) reviews all of the foregoing cases and declares the true construction of the statute to be *"the right to purchase coal lands is initiated by the actual discovery of coal on the land and the performance of some act of improvement sufficient to give notice to the world of an intent to purchase such lands as coal lands."* He then finds that "Nelson *uncovered* a four-foot vein of coal," and, applying the above interpretation of the statute, holds: "Nelson's right was initiated by the *development* on May 19, 1897, of a four-foot vein of coal." Apply that same construction to the case at bar and the rights of the locators herein are established.

We are entitled to that construction. By all the law, our rights must be adjudicated under that interpretation. It stood unmodified and unchanged on the day our rights were initiated. We had the right to rely and did rely on these unequivocal holdings and decisions of the Land Department, whose officers are by law constituted the sole disposing

agents of the Government in the administration of public lands.

In reliance on this settled construction of the coal land laws, these locators, in the year 1904, in good faith performed those acts which the Land Department for more than thirty years had said constituted the opening and improving of a coal mine.

In the year 1906, as this court judicially knows, a program of conservation was adopted. The President withdrew Alaska coal lands from entry. And in furtherance of that program the policy of the Land Department was changed. The prior policy was a liberal policy. The new policy was more exacting. It was made effective by the Department by means of a new and different construction of the statute. We have no quarrel with the new policy. We have no criticism to make. In short, we are not concerned with it in this case, for, under the law, it can have no retroactive operation and therefore cannot affect our rights.

The decision of the Register and Receiver on these claims, made on June 15, 1914, holding that the locators had not opened or improved a coal mine or coal mines, and rejecting the application of plaintiff in error for patent, contains these statements:

"There is no serious doubt but that on all of the claims excepting the Aurora No. 7, pits or open cuts or veins that in some measures could be worked, perhaps at a loss, are to be found.

The defense has sought to show that prior to the location of these claims the qualification of the locator in opening or improving a coal mine is not the qualification now required of the same locator and has appealed to the rule to abide by the cases formerly adjudicated.

The liberal spirit of the requirements of the Department under the General Coal Land Laws comes of what may be termed a policy, to permit the man of small means as well as the man of better circumstances, to become a beneficiary thereunder, and is due also to the fact that the opening and improving of a coal mine under the general law secures only a preference right, a right of entry yet remaining under Section 2347.

Under this policy and because of the presence of Section 2347 in the general law, good faith and the large play of this qualification of the locator has become almost a controlling force in the adjudicated cases, which often show improvements no greater in extent and value than appear in this case and of like character. The qualifications given in rule three in the foregoing, have been developed not only from a construction of the statute, but also from the effort of the adjudicating officer to determine whether the 'labor expended and improvements made' are 'such as to clearly indicate the good faith of the claimant.' Under the 1904 act there is not the assistance derived from Section 2347 permitting a larger controlling influence of the good faith as it appears in the improvements themselves. There is not, then, such a common

statutory intent expressed in the general law and the Act of 1904 as will permit an adjudication under the rule of *stare decisis* even if it be conclusively shown that the qualification formerly defined is not what is now sought to be exacted of the locator.

The absence of any well expressed intent to mine the coal, the intent, such as it appears, to prospect the claims rather than to develop paying mines, the failure to show clearly in the labor expended and improvements made a qualifying intent, or to show that such work or improvements was potentially capable of becoming part of the operating plan of a producing mine and that the steps therein taken were substantial and looked to the creation of an operating and producing mine are all matters of evidence submitted which sustain charge four, as to all of the claims" (pp. 13 and 14, Transcript of Record).

They say that on all of the claims in suit open cuts or veins that in some measure could be worked are found. This brings us within the terms of the decisions in *Watkins vs. Garner, supra; Paire vs. Markham, supra,* and *Reed vs. Nelson, supra,* as is admitted by the decision, which says:

"* * * the adjudicated cases, which often show improvements no greater in extent and value than appear in this case and of like character."

We submit that this finding of fact by the Department is sufficient to entitle the plaintiff in error to a patent to these lands.

Then follows this remarkable holding:

"There is not, then, such a common statutory intent expressed in the general law and the Act of 1904 as will permit an adjudication under the rule of stare decisis even if it be conclusively shown that the qualification formerly defined is not what is now sought to be exacted of the locator" (p. 13, Transcript of Record).

The Register and Receiver thus expressly *deny* to us the application of the rule of *stare decisis*, which is the universal rule of the Department and of this court and of all courts. And in this they are sustained by the Commissioner and the Secretary (defendants in error) in their decisions of June 7, 1915, and January 24, 1916, respectively. *Alaska Smokeless Coal Co., et al.*, unreported, January 24, 1916.

This holding is made in the face of the statement of the Department in the case of *John L. Long*, 43 L. D. 305, which case is cited and relied upon by the Secretary in this case, as follows:

"It will be observed that the words descriptive of the persons who are entitled to the benefits of this Act (Act of April 28, 1904) are precisely the words used in the Act of 1873, which designated the persons, who, under its provisions, were entitled to a preference right of entry. The last statement is subject only to the exception that the conjunction 'and' between the words 'opened and improved' as found in the Act of 1873, was changed in the Act of 1904 to

'or' so as to read: 'opened or improved.' It is believed, however, that this change cannot substantially modify the interpretation to be given to the statute and the change in the conjunction may be disregarded for all practical purposes. Subsequent legislation affecting coal lands in Alaska has no relation to the subject now under consideration.

It follows, therefore, that no one prior to the extension of the regular government surveys over Alaska is authorized to acquire title to any public coal lands there situate unless and until he has done and performed those acts and things which, if done in the United States, would entitle him to a preference right of entry under the Act of 1873, as hereinbefore construed."

The opinion of Attorney General Wickersham to the Secretary of the Interior under date of June 12, 1909, as reported in 38 L. D. 86, says:

"Under this legislation (Act of April 28, 1904,) the ordinary cash coal entry provided for by Section 2347 revised statutes, could not be made because the lands had not been surveyed; coal entries in Alaska could be made only by securing the 'preferential right' provided for by Section 2348 revised statutes by opening and improving one or more coal mines on the land sought."

In addition to these holdings of the Land Department itself, this court, in the case of *United States vs. Munday,* 222 U. S. 182, says:

"It is, however, to be borne in mind that this act of 1904 is but an amendment to the act of 1900, which extended these sections (Secs.

2347-2352, Revised Statutes)of the general coal entry law to the district of Alaska. The three acts are *in pari materia* and must be read together, and no part of the previously existing law upon the same subject is to be regarded as inoperative unless no other construction of the later legislation is reasonable.

The single object of Congress in the act of 1904 was to provide for the sale of coal lands which had not been surveyed. The provisions for the sale of such coal lands, in or out of Alaska, which had been surveyed, so that entries could be made 'by legal subdivision,' had already been covered by the general law which had been extended to Alaska. The conditions in Alaska were but temporary. When the coal land there should be brought under the system of surveys which prevailed in the better settled parts of the country, the act of 1904 would cease to be operative, having nothing to which it could apply."

We again quote from the decision of the Register and Receiver in the case at bar, as follows:

"The absence of any well expressed intent to mine the coal, the intent, such as it appears, to prospect the claims rather than to develop paying mines, the failure to show clearly in the labor expended and improvements made a qualifying intent, or to show that such work or improvements was potentially capable of becoming part of the operating plan of a producing mine and that the steps therein taken were substantial and looked to the creation of an operating and producing mine, are all matters of evidence submitted which sustain charge four, as to all of the claims" (pp. 13 and 14, Transcript of Record).

Where do we find in the cases adjudicated prior

to November 12, 1906, any requirement to "develop paying mines," or the necessity of a showing "that such work or improvements were potentially capable of becoming part of the operating plan of a producing mine," or that the steps taken "looked to the creation of an operating and producing mine"? They are not there. They are new requirements. There were unknown to the locators. Had these new and additional requirements been introduced by statute no court would have given them any retroactive effect. Surely if Congress cannot do this directly, the administrative officers of the Department cannot do it indirectly by construction.

The decisions on these claims by the Register and Receiver, the Commissioner and the Secretary were all based upon the following decisions of the land Department:

Esther F. Filer, 36 L. D. 360, decided April 21, 1908.

Andrew L. Schofield, 41 L. D. 176, decided June 21, 1911.

John L. Long, 43 L. D. 305, decided May 27, 1914.

James Warddell, unreported, decided June 24, 1914.

F. A. Willoughby, unreported, decided June 7, 1915.

It will be observed that all of these decisions were rendered subsequent to November 12, 1906. They laid down a new construction of the statute which changed the settled construction of the Department and they are not binding on the plaintiff in error.

We shall briefly notice these decisions upon which the departmental decision in the case at bar is grounded.

The case of *Esther F. Filer, supra,* simply held that "merely cleaning out old coal prospects" did not constitute the opening and improving of a coal mine, and added that "substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential." As above shown in discussing the departmental decision in the case at bar the last above quoted statement of the Department introduces a new element—that is, that the work done must be substantial steps looking to the creation of an operating and producing coal mine. This requirement was unknown under the interpretations laid down by the Department prior to 1906. The *Filer* case cites the unreported case of *McDonald vs. Crawford,* decided March 16, 1907, which held "the act of merely clearing the face or surface of an outcropping of coal" was not the opening and improving of a mine, and also the case of

Charles S. Morrison, 36 L. D. 126, decided October 21, 1907, which held "appellant presented the declaratory statement too late," and decided nothing else.

The case of *Andrew L. Schofield, supra,* involved thirty-three claims. The Department found that nothing whatever had been done to open or improve a mine or mines of coal on sixteen of the claims, that a small amount of open cut work had been done on each of twelve of the claims, and that tunnels had been driven on the remaining five claims. They cite the case of *McDonald vs. Crawford, supra,* which has already been noted; the case of *Hatop vs. Lathrop,* unreported, decided April 5, 1907, and the case of *Thad Stevens,* 37 L. D. 723, decided March 28, 1909; also the case of *Esther F. Filer, supra.* The *Hatop* and *Stevens* cases, *supra,* each held that the mere penetration of a bed of coal by a small drill did not constitute the opening and improving of a coal mine. The decision then proceeds:

> "If the work of driving the tunnels on the various claims had been steps in the creation of operating and producing mines on said claims even though it had not progressed to the extent that commercial development was assured, it might be contended that the requirements of the statute had been met as the lands were admitted by the Government to be coal in character, but the tunnels were driven not with the intent of developing operating mines, but for the purpose of ascertaining whether the group of claims con-

tained coal in workable quantities and of merchantable qualities."

This is on the authority of the *Filer* case, *supra*. It further appears in the *Schofield* case that three charges had been filed by the Department against the claimants—first, charges of bad faith; second, charges of fraud and illegality; and third, that no mine of coal had been opened or improved; and the decision states "the Government has conclusively established the several charges brought against them."

In the case of *John L. Long, supra*, the claimant's application for patent states "that I have not expended any money in any development of coal lands on said tract in labor and improvements," and it was found that "no improvements had been made on the claim." The patent was therefore denied.

As above pointed out, it was held in the *Filer* case and the *Schofield* case, *supra*, that the work done must look to the creation of an operating and producing mine and this same language was used in the decision of the case at bar. However, we find that on November 11, 1915, in the case of *Alaska Petroleum & Coal Company*, 45 L. D. 56, the Department had before it for adjudication twelve claims. The decision contains the following language:

"Mr. Hunt who had charge of the development of the claims, testified that his instructions were to go upon the ground and find coal upon each of the locations, and that acting upon such instructions he prospected the coal veins upon their outcrops at various points; that as soon as he had faced up the coal and disclosed both walls of the vein, he would move on to the next claim and continue his work in a similar manner; that this work was done for the purpose of determining the thickness and continuity of the veins and whether the coal was of such commercial quality and in such quantities as to warrant the large expenditures necessary for the opening of a commercial mine."

And further,

"The principal improvement made by Mr. Hunt was upon the Fremont claim, where a tunnel 20 feet long was run in 1906 and continued in 1907 to a length of 70 feet and in 1908 to a total length of 195 feet. Mr. Hunt testified that this tunnel was driven for the purpose of prospecting and that he made no effort to locate a working tunnel designed for the commercial mining of coal. A part of Mr. Hunt's testimony along this line is as follows:

"Q. The object of that development work was not, then, to mine coal.

A. No. It was not my intention at all and it was not the report that I made to Mr. Davis. The report I made to him was that I had found an ideal spot for the prospecting tunnel.

Q. It was?

A. Yes.

Q. Had you found any ideal spot for mining coal on that place?

A. No.

Q. If you had intended to mine coal, would you have selected that particular vein or that particular place on the claim?

A. On that claim, I would; yes.

Q. Would you have considered that a proper location for the purpose of mining coal?

A. No. I would never have made any location. I did not consider myself competent to make a location for a working tunnel."

The secretary then finds that no mine or mines of coal were opened or improved on any of the twelve claims except the Fremont claim, and as to the Fremont claim they find a mine of coal was opened and improved thereupon prior to November 12, 1906, and ordered that patent issue therefor.

We submit that the language above quoted and the questions and answers therein set forth show that the claimant of the Fremont claim made his openings merely for prospecting purposes and not for the purpose of opening or improving a producing coal mine or coal mines, which the same secretary, less than three months later, in deciding the case at bar, said must be done. The opinion in each case is signed by Assistant Secretary Jones. Nevertheless, a patent was ordered issued for the Fremont claim and the patent was denied in the case at bar.

Up to this point our argument has gone upon the theory that the words "opened *or* improved" in the Act of 1904 were synonymous with the words "opened *and* improved" in Section 2348 of the Revised Statutes, and this seems to have been the theory of the defendants in error below and of the Department in all their decisions, and especially in the case of *John L. Long, supra,* as already shown.

We believe, however, that the language of the Act of 1904, under the construction of the Department as it obtained prior to November 12, 1906, is far more liberal to the locator than are the words of the General Coal Land Laws. By no possible construction could the Act of 1904 be held to be more exacting in its requirements of the entryman than Section 2348. We shall now briefly examine the Act of 1904 in the light of the decisions of the Land Department and the courts prior to the time our rights were initiated.

It will be necessary to first determine the meaning of the words "coal mine" as used in the Act. We contend that the term "coal mine," as used in the coal land laws, is properly defined as a coal vein or a coal deposit.

Congress has always so understood the term.

The Pre-emption Act of September 4, 1841, excepts from pre-emption and sale "lands on which are situated any known salines or *mines.*" (5 Stat. 453, Ch. 16, Sec. 10.)

The Act of July 1, 1864, provides:

> "That where any tracts embracing coal beds or coal fields constituting portions of the public domain and which *as mines* are excluded from the pre-emption act of 1841. * * *"

Without doubt the coal land sections of the Revised Statutes (Secs. 2347-2352) use the word "mine" in the sense for which we contend. Thus, Section 2348 says that one "who has opened and improved * * * shall be entitled to a preference right of entry of the *mines* so opened and improved," and the proviso reads:

> "When any association of not less than four persons * * * shall have expended not less than five thousand dollars in working and improving any such *mine or mines,* such association may enter not exceeding six hundred forty acres, *including such mining improvements.*"

Evidently the word "mines" here imports not the artificial workings, but the land and its underlying coal deposits. The very language implies the prior existence of the mine to be opened and improved. The same is true of the Act of 1904.

Again, Section 2352 saves prior rights and declares that the preceding sections shall not be held

"to authorize the sale of lands *valuable for mines of gold, silver or copper.*"

The Revised Statutes and Acts of 1900 and 1904 must be read together.

United States vs. Munday, supra.

The courts and text writers have so construed the term "mine."

This court in the case of *Colorado Coal & Iron Co. vs. United States,* 123 U. S. 307, 328, held that if land contains deposits of coal of such an extent and value as to make the land more valuable to be worked for its coal than for merely agricultural purposes, *it is a mine.*

This case interpreted the Acts of Congress from 1841 to and including Sections 2347-52 of the Revised Statutes.

See also

Deffeback vs. Hawke, 115 U. S. 392.

Davis vs. Weibold, 139 U. S. 507.

Cox vs. U. S. ex rel McGarrahan, 9 Wall. 298.

Bullion, Beck & Champion Min. Co. vs. Eureka Hill Min. Co., 5 Utah, 3.

Wheeler vs. Smith, 5 Wash. 704.

A mine is defined as "an equivalent for vein, seam or lode."

Lindley on Mines (3d Ed.), Sec. 176.

This construction of the term "mine" had become settled by the Land Department itself and was applied by it in all cases down to the case of *Andrew L. Schofield, supra,* in 1911, where the position was apparently taken that the "workings," the "openings" and the "improvements" constituted the mine.

Commissioner Williamson, on October 12, 1878, in construing Section 2323, Revised Statutes, stated the proposition plainly, as follows:

> "This section provides that where a tunnel is run for the development of a vein or lode for the discovery of mines, the owner of such tunnel shall have the right of possession of all veins or lodes within certain bounds."

The Commissioner further says:

> *"The tunnel is a means of discovery. When the lode is discovered, the tunnel proprietor must proceed in locating surface ground, staknig off the same, posting notices, etc., as if the mine was discovered from the surface."*

The Commissioners, instructions to give effect to the act of Congress approved July 1, 1864, in regard to coal lands, shows the interpretations placed

upon the term "mine" in that act. His instructions state:

> "It will be observed that the word *mine* as used in the pre-emption act of 1841 is recognized in the first section of this law *as importing any tracts of the public domain embracing 'coal beds or coal fields'* which are to be treated as mineral lands and not subject to ordinary private entry."

The same construction is supported by:

Ouimette vs. O'Connor, 22 L. D. 538.

Johns vs. Marsh, 15 L. D. 196.

Rucker vs. Knisley, 14 L. D. 113.

Hamilton vs. Anderson, 19 L. D. 168.

Reed vs. Nelson, supra.

Nancy Ann Caste, 3 L D. 169.

Having found that under the settled construction of the Courts, the Congress and the Land Department itself, prior to November 12, 1906, the term coal mine is properly defined as a "coal vein" or "coal deposit," let us now ascertain what Congress intended by the use of the term "opened *or improved* a coal mine."

The word "open" as a transitive verb means to make open; to cause to be open, to unlock, unfasten, or draw apart or aside, and thus afford access

or egress, or a view of the interior parts; to unclose. The word "improve" means to make better.

Webster's Dictionary.

Century Dictionary.

It might be that the mere opening of a mine would to some extent improve the mine, at least it would seem so from the prior holdings of the Department. But the fact that the locator did more than he was required to do cannot prejudice him. It would be possible to improve a mine without opening it, for it is a notorious fact that in Alaska there are many outcroppings of coal exposing veins of great thickness from which coal could be mined without further steps being taken, as appears from the case of *John L. Long, supra.* The Congressional offer is—you may either open *or* improve. You have the alternative. Under the general law (Sec. 2348 R. S.) you must open *and* improve.

So construed the Act of 1904 is rational, liberal and consistent with the intent of Congress as expressed in the title and as indicated in the discussion of the subject in and out of Congress in 1902, 1903 and 1904.

This change was made advisedly and of purpose. The enactment (Act of 1904) came as the result of widespread agitation for the development of Alaska.

The crying needs of that district for fuel from the public domain, and the known hardships and difficulties to be encountered by the locators by reason of the physical and other conditions there obtaining, and the lack of transportation facilities, were all brought to the attention of Congress. Congress was deliberate in its action and we must presume there was no inattention by the committees or the draftsmen in the wording of the statute.

Evidently all these matters were considered by the Public Lands Committee, as they were when it had under discussion the Act of May 28, 1908, for in House Report 1728 of May 12, 1908, on Senate Bill 6805, it is stated, referring to the Act of 1904:

> "While this legislation provided for location and therefore the locations made under the law are valid and should be perfected, it soon developed that it was not adequate to meet the conditions existing in Alaska owing to the expense of surveys, the broken character of the deposits which rendered the discovery of coal on every 160-acre tract difficult.
>
> Conditions are such in the Alaska field that a large acreage is required for successful operation, as there is no immediate market for the coal and a market must be sought along the Pacific Coast.
>
> This condition is accentuated by the character of the country in which most of the coal occurs, it being such that the openings can only be conducted on the croppings accessible and the lands back of such croppings can only be mined successfully through such openings. * *"

It must also be noted that under the Act of 1904 the opening or improving of a coal mine was a condition precedent to the location of the land on which the mines were located.

Under any theory, we believe when the locators here actually excavated the earth and opened and exposed to view a vein of coal from which opening the coal could have been mined, as this record shows without dispute was done, that under the law, as then interpreted, the rights of the locators became fixed and vested—and those rights were not, and cannot be, divested by a subsequent change in interpretation of the law.

II.

It was the absolute legal duty of the respondents (defendants in error) not qualified by any official discretion to find and hold that the locators had opened or improved a coal mine or coal mines on their respective claims, and to issue a patent therefor to the relator (plaintiff in error). This duty was purely a ministerial duty, and is enforceable by mandamus.

A.

The following facts are established and expressly found by the Land Department in its decision on these claims:

1. That openings were made in 1904 on all of the claims, exposing veins of coal from three to fifteen feet in thickness (p. 11, Transcript of Record).

2. That on all of these claims pits or open cuts or veins that in some measure could be worked are to be found (p. 13, Transcript of Record).

3. That the prior cases adjudicated by the Department under the General Coal Land Laws often show improvements no greater in extent and value than appear in this case and of like character (p. 13, Transcript of Record).

4. That charges numbered 1, 2 and 3 filed by the Land Department against the locators were not sustained (p. 20, Transcript of Record).

5. That the Land Department rejected the application of plaintiff in error for patent on the ground that the work performed upon the claims did not constitute the opening or improving of a coal mine or coal mines under the coal land laws, and aside from any other reason (p. 27, Transcript of Record).

Thus no fact is in dispute. No question is made by either party as to any fact in this record.

The same decision states the following propositions as the law applicable to these claims:

1. That the plaintiff in error is not entitled to an adjudication under the rule of *stare decisis* even if it be conclusively shown that the qualification formerly defined is not what is now sought to be exacted of the locator (p. 13, Transcript of Record).

2. That to constitute the opening or improving of a coal mine within the meaning of the Act of 1904, it was necessary that a well expressed intent to mine the coal be found, that a clear showing must appear in the labor expended and improvements made of a qualifying intent, or a showing made that such work or improvements were potentially capable of becoming part of the operating plan of a producing mine and that the steps taken were substantial and looked to the creation of an operating and producing mine (pp. 13, 14, 27, Transcript of Record).

3. That the requirements of the Land Department under the coal land laws come of what may be termed a policy (p. 13, Transcript of Record).

We do not believe that the defendants in error will deny that the departmental decision herein makes the above showing as to the facts found and the law stated therein.

We do not complain of the facts found. They are conceded to be true, and being true, the locators' rights became fixed and vested as of date of the

occurrence of those facts. The work performed by the locators constituted the opening or improving of a coal mine under the then settled construction of the law, and the departmental decision so states. At that instant the right of the locators to a patent became a vested right under the statute (Act of 1904). The language is:

> "That such locator or locators, or their assigns * * * shall receive a patent to the land located."

This vested right of the locator cannot be divested by law. It cannot be divested by the Land Department nor by any officer thereof.

The duty of the defendants in error to issue the patent became fixed. This duty is a purely ministerial duty and does not involve the exercise of discretion.

After the rights of the locators became vested the policy of the Department was changed. Where it had pursued a liberal policy, it henceforth adopted an exacting policy. It pursued a policy of conservation. It accomplished this change of policy by means of a new, a strict and a different construction of the coal land laws. But that new policy and that new construction had no retroactive operation. The Secretary and Commissioner thought it had such operation. They believed they had a discretion to apply it retroactively in this case, and they as-

sumed this discretion when they denied to us the application of the rule of *stare decisis*, and when they applied to the coal land laws a construction requiring the locators to perform work looking to the creation of an operating and producing mine.

Congress has the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase; it has done so by this act and the command which it has expressed on this subject cannot be disregarded and every right which it conferred on the citizen taken away by an unlimited and undefined discretion assumed by the administrative officers appointed for the purpose of giving effect to the law.

Daniels vs. Wagner, 237 U. S. 547.

> "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Constitution, Article IV, Sec. 3, par. 2.

The land department has no inherent powers over the public lands. All its powers in that regard, both discretionary and judicial, are derivative and have been delegated to it by Congress. This department has no duty higher than the duty of diligently ascertaining from the statutes enacted by Congress

the policy which the legislative branch of the government has established and to administer the affairs of that office with the view to executing that policy. The function of the land department is to ascertain the will of Congress, and, upon ascertaining it, to effectuate it in so far as it is in the power of the department to do so. If the department errs in concluding that a legal right does not exist when it does in fact exist, such conclusion may postpone the enjoyment of the right but can not destroy it. In the case of *Knight vs. U. S. Land Association*, 142 U. S. 161, it was by this court declared to be the duty of the secretary of the interior "to do justice to all claimants and preserve the rights of the people of the United States." This statement of the court not only implies a wide power in the secretary but it also indicates the limits of the exercise of that power. It must be exercised only in accordance with the law. It does not mean that the secretary may or may not perform an act accordingly, as in his discretion it may be deemed expedient or inexpedient in the public interest to perform it. Congress has by statute declared what is expedient and the discretion of the secretary must yield to the discretion of Congress. Therefore, in all cases before the land department it is the function of the department to determine judicially the intention and will of Congress as ex-

pressed in the statute and to apply such rules of construction thereto as will carry out that will, so that the discretion lodged in the secretary is what is known as a legal and judicial discretion, which has been defined as follows:

> "Ability to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion; freedom to act according to the judgment of the court, or according to the rules of equity and the nature of circumstances; judicial discretion regulated according to known rules of law; legal discretion and not a personal discretion; sound discretion guided by fixed legal principles; sound discretion guided by law; sound judgment to be exercised according to the rules of law; sound judicial discretion."

14 *Cyc.* 383, 384.

No better definition of judicial discretion can be stated than that given by Chief Justice Marshall in the case of *Osborn vs. Bank of U. S.*, 9 Wheat 738:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the

will of the legislature; or, in other words, to the will of the law."

A legislative act is to be interpreted according to the intention of the legislation apparent on its face.

United States vs. Fisher, 109 U. S. 145.

"The intent of the lawmakers is the law."

Jones vs. Guaranty Co., 101 U. S. 626.

"The meaning of the legislature constitutes the law."

Raymond vs. Thomas, 91 U. S. 715.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. He is presumed to know the meaning of words and the rules of grammar."

United States vs. Goldenberg, 168 U. S. 102.

"The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more." *Johnson vs. Southern Pacific Co.,* 117 Fed. 465.

The foregoing rules of construction as applicable to the Act of April 28, 1904, and the Act of May 28, 1908, were laid down by Attorney General Wickersham in his opinion to the Secretary of the Interior on June 12, 1909, 38 L. D. 86.

What was the policy of Congress as to Alaska coal-lands? By the Act of June 6, 1900, Congress attempted to extend the general coal-land laws of the United States (Sections 2347 to 2352 Revised Statutes) to Alaska. This purpose failed of accomplishment for the reason that there were no public surveys in Alaska. Congress then amended the Act of June 6, 1900, by the Act of April 28, 1904. The policy of Congress did not change in 1906. We find no repeal of, nor amendment to the Alaska coal land laws in that year. So that the change of policy by the department was not authorized by Congress. The expressed policy of Congress to encourage entry of Alaska coal-lands continued, as is evidenced by the Act of May 28, 1908, entitled, "An Act to encourage the development of coal deposits in the Territory of Alaska."

The Act of May 28, 1908, originated as Senate Bill 6805. In House Report No. 1578, Sixtieth Congress, first session, the House Committee on Public Lands in reporting on this bill, went into the history and condition of coal-land locations in Alaska. Among other things this report says:

> "The object of this bill is to enable coal locators in the District of Alaska to consolidate their holdings in such a way as to make possible the development of the coal fields in that region.
>
> * * * * * * * * * *

> "The legislation proposed will enable the pioneers who discovered and prospected these fields to realize upon their claims and will make possible a much needed development in the Alaska field."

The defendants in error and many other administrative officers, being subordinate functionaries of the executive of the United States, exercise, as part of their functions, *quasi*-judicial powers, when passing upon applications relative to property or rights asserted against the Government.

In matters of fact they have discretionary powers, and the interference of the regular courts would be productive of nothing but mischief because it would mean that a large and important part of the daily exercise of governmental powers must be carried on subject to the constant check and oversight of the courts. But, on the other hand, that discretion is only a judicial discretion. It is not an arbitrary and uncontrolled and uncontrollable discretion. The law is superior to them, as it is to the courts and to all private citizens and organizations. If that were not true—if a Department officer had the power, by virtue of an assumed "discretion" to interpret, construe and apply a statute, or a rule of law, whatever its origin, as he chose and independent of all judicial review, he would have a "dispensing power" superior to the courts; and we would have a govern-

ment of men, and not of laws. We would have no "vested rights," within the purview of any bureau official—however secure our rights as to other matters may be under the constitution.

The true line of principle which the courts draw, is that the so-called "discretion" of the Department officers, their power to decide according to their judgment, is confined to matters of fact, and their legal inferences are, as are those of other judicial officers, subject to review, and by such review are to be brought into conformity with the law.

These officers do not have an unlimited and arbitrary power to alter the law. They can neither dispense with the law nor amend it under the guise of discretion. In the present case, however, the Department has acted in disregard of the settled construction of the statute for many years, and of the practice of the Department itself for over thirty years; decisions of the Supreme Court construing the terms found in the statute have been disregarded; the popular use and understanding of the term have been ignored, and the act of Congress, in necessary effect, is amended by departmental decision.

B.

The duty of the Secretary to cause the issuance of a patent was a ministerial duty and is enforceable by mandamus.

This controversy is narrowed down to the single issue, whether mandamus will lie to compel the Secretary to issue a patent to coal lands opened or improved under, and in compliance with the requirements of the coal land statutes as then and for more than thirty years construed by the Land Department, where subsequent to such compliance the policy of the Department has changed and a construction more exacting placed upon those statutes.

That the acts of the locators constituted a compliance with the statute as then construed is conceded. Thus there was no field for the exercise of discretion. There was nothing for the judgment of the Secretary to operate upon. His duty is fixed by the Statute to issue patent. That duty is clearly ministerial.

The fact that he misconstrued his duty and took it upon himself to decide that the relator was not entitled to a patent cannot introduce into the case the element of discretion and thus defeat the rights of the claimants. The assumed discretion did not exist.

In the case at bar we are not asking this court to review any finding of fact made by the Secretary as counsel in the court below insisted we were doing; nor are we attempting to use the writ of mandamus as a writ of error as was charged below. We are asking this court to compel the Secretary to perform his plain duty under the Statute—to issue a patent —which duty he has not performed, for the reason as stated in his decision that he has failed and refused to apply to the case a rule of positive law—the rule of *stare decisis*. And this notwithstanding the fact that it has always been the rule of his Department and the rule of this court. He further justifies his nonperformance of duty by holding that the rules of interpretation promulgated by his Department subsequent to November 12, 1906, have a retroactive operation. In thus holding he has misconstrued the law, and has violated the law, and has repealed the law. This is not the exercise of a discretion. Its effect is to deprive the relator of its vested rights in land lawfully entered and paid for.

> "It (the power of supervision possessed by the Commissioner of the General Land Office over the acts of the Register and Receiver of the local Land Offices in the disposition of the public lands) can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be

deprived of it by order of the Commissioner than he can be deprived of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." *Cornelius vs. Cassel,* 128 U. S. 456.

We are relying on the decision of this court in the case of *Lane vs. Hoglund,* 244 U. S. 174, the opinion being written by Mr. Justice VanDevanter on May 21, 1917. This was a petition for a writ of mandamus against the present Secretary of the Interior (one of the defendants in error herein) to compel the issuance of a patent to a homestead entryman under the Act of March 3, 1891. The statute provided:

> "That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

The court says: "What is meant by a 'pending contest or protest' is the question under the statute." The facts were not in dispute and are as follows:

> In 1902 Svan Hoglund settled upon and made preliminary entry under the homestead law of a tract of public land in the Eureka Land

District of California. In 1905 the land was included within a National Forest Reserve by a proclamation of the President. In due time thereafter and after due notice by publication of his purpose so to do Hoglund submitted final proof of compliance with the homestead law and of his right to obtain the title. The proof was accepted as satisfactory by the local officers, and on August 6, 1907, a receiver's receipt and a register's certificate upon final entry were regularly issued to him.

May 29, 1909, a report from a Deputy Forest Supervisor recommending the cancellation of the entry "on account of non-residence and lack of cultivation" was received at the general land office. The report indicated that the entryman was a single man and had a three-room house, a small barn and some fencing on the land; that he had three acres plowed and under cultivation; that the land had much valuable timber thereon but none had been cut except for improvements; and that the entryman had established actual residence on the tract in June, 1902, but had really lived thereon only at unnamed periods, "going away to work for wages four or five months at a time." No action upon this report was taken until April 19, 1910. On that day, almost three years after the date of the receiver's receipt, the Commissioner of the General Land Office ordered a proceeding in the local land office to determine whether the entryman had established and maintained a residence upon the land. Notice of this was given to him—apparently it was his first information that his entry was called in question—and a hearing was had. The local officers and the Commissioner of the General Land Office in turn found the facts in his favor, but the Secretary of the Interior found them the other way and ruled that the entry was not confirmed or

protected by the provisions of the above statute and directed that the entry be canceled. Thereupon the petition for mandamus was filed praying for a writ commanding the Secretary to recall the order to reinstate the entry and to cause a patent to be issued to the entryman.

The Court says:

"The statute makes it very plain that if, at the expiration of two years from the date of the receiver's final receipt, there is no 'pending contest or protest' against the entry, its validity no longer may be called in question; in the words of the act, 'the entryman shall be entitled to a patent * * * and the same shall be issued to him.' The purpose to fix his right and to command its recognition is obvious. What, then, is the 'pending contest or protest' which is to exclude a subsisting entry from this Statute of Limitation and repose? Is it some proceeding which is begun, ordered, or set in motion in the interest of another claimant or of the public, to test or determine the validity of the entry? Or may it be a mere report, letter, or other communication, confidential or otherwise, which has not been and may never be acted upon, which may be neither known nor accessible to the entryman, or which may be so general, vague, or intemperate in its statements as not in itself to merit attention? Independently of the occasion for the enactment and of the practice of the Land Department, there hardly could be any difference of opinion about the answer. And when these are understood we think there is no room whatever for a difference; in short, the reference is to a proceeding against the entry, and not to some communications which, at most, is only suggestive of the propriety of such a proceeding, and may never become the basis of one.

"As applied to public land affairs the term

'contest' has been long employed to designate a proceeding by an adverse or intending claimant, conducted in his own interest, against the entry of another, and the term 'protest' has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry."

The court then goes into a careful examination and review of all the decisions of the Land Department construing the term "pending contest or protest" and finds that what had taken place in this cause did not constitute a "pending contest or protest" according to the settled construction of that term by the Department, and proceeds:

"Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry, and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute, that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time, it shall be passed to patent as a matter of course. Thus in a case like this,

where, according to the conceded facts, no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but, on the contrary, a plain duty to see that the entryman receives a patent.

"True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so."

The court then quotes at length from the case of *Roberts vs. United States,* 176 U. S. 221, and closes with the statement: "We therefore conclude that the Court of Appeals rightly directed that the writ be granted."

This case is almost identical in its facts with the case at bar. The Secretary there held that the report received from the Deputy Forest Supervisor, recommending a cancelation of the entry, was a pending contest or protest as used in the statute. This court reviewed this holding of the Secretary and determined for itself what was meant by the term. In doing this the court made a comprehensive examination of the decisions of the Land Department itself and adopted the Land Department's prior construction of the statute and held that there was no pending contest or protest.

So in the case at bar the Secretary has held that the locators performed those acts necessary to con-

stitute the opening or improving of a coal mine under the statute as contemporaneously construed, but that subsequent to the performance of said acts the construction of the statute was by the Department changed so as to exact of the locators different and additional requirements and qualifications; that such change in the construction of the statute had a retroactive operation; that the locators are not entitled to an adjudication under the rule of *stare decisis*; that the vested rights of the locators be divested and patent denied. All of which is contrary to the rules and decisions of the Department and the decisions of this court.

As in the Hoglund case there was concededly no pending contest or protest, so in this case according to the conceded facts the locators did open or improve coal mines on their respective claims. Therefore "there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent."

It would seem that very little remains for this court to do other than to apply to this case the rule laid down in the Hoglund case.

The case of *Roberts vs. U. S. ex rel Valentine*, 176 U. S. 221, decided by this court February 5, 1900, and quoted from at length in the Hoglund

case, *supra*, was a petition for mandamus to the Treasurer of the United States to compel him to pay to the relator a residue of 2.35 per centum interest upon certain certificates issued by the Board of Audit of the District of Columbia.

We cannot do better than to quote from the opinion of the court affirming the judgment of the Court of Appeals of the District of Columbia ordering the writ to issue. The court says:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and there-

fore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

"In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

This case applies with great force to the case at bar. The Secretary having found the facts as he did in this case nothing remained for him to do but construe the Statute in accordance with the Department's settled construction.

The case of *Kendall vs. United States,* 12 Pet. 524, one of the early cases of this court, lays down the doctrine we are contending for. It affirmed a judgment awarding mandamus to the Postmaster-General of the United States to credit the relators who had a contract for carrying the mails with the amount found due them from the United States according to a decision of the Solicitor of the Treasury under an act of Congress. The court says:

"It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.

"To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

Nor can the Secretary here under his obligation to faithfully execute the laws forbid their execution and call it the exercise of his "discretion."

In *United States vs. Schurz,* 102 U. S. 378, this court awarded mandamus against the Secretary of the Interior to compel him to deliver to the relator a patent to certain public lands which was held to be a ministerial duty.

In *Garfield vs. United States,* 211 U. S. 249, mandamus was granted to the Secretary of the Interior to undo his action in summarily striking from

the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received his allotment certificate and is in possession of the land, the court saying:

> "* * * there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

The case of *Ballinger vs. United States, ex rel Frost,* 216 U. S. 240, was a mandamus to the Secretary of the Interior to compel the execution and delivery of a patent to lands. The court in granting the writ quotes with approval from *Simmons vs. Wagner,* 101 U. S. 260, as follows:

> "Where the right to a patent has once become vested in the purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued."

In *Noble vs. Union River Logging R. R. Co.,* 147 U. S. 165, it was held that under the act of March 3, 1875, granting to railroads a right of way through the public lands, when the Secretary of the Interior had decided that a railroad was entitled to the benefit of the grant and his approval was noted upon the plats a revocation of the approval of the Secretary by his successor in office, is an attempt to deprive the company of its property

without due process of law, and is void and will be enjoined.

> "In such cases the writs of mandamus and injunction are somewhat correlative to each other."

Board of Liquidation vs. McComb, 92 U. S. 531.

In the case of *American School of Magnetic Healing vs. McAnnulty,* 187 U. S. 94, which was a bill to enjoin a Postmaster from carrying out an order of the Postmaster-General, it was held that the Postmaster-General is not justified in prohibiting the delivery of letters addressed to a corporation which assumes to heal disease through the influence of the mind, by the provisions of United States Rev. Stat. Section 3929, 4041, and the Act of Congress of March 2, 1895, which authorized the retention of letters directed to any person obtaining money through the mails by false pretenses or promises, as the effectiveness of such treatment is mere matter of opinion, and the statutes are only intended to cover cases of actual fraud in fact. And it was further held in this case that the determination of the Postmaster-General that letters addressed to a certain corporation should be refused delivery is not so conclusive on the Federal courts as to preclude them from granting injunctive relief to such cor-

poration, where his action was not authorized by the statutes under which he assumed to act.

In the case of *United States vs. Dickson*, 15 Pet. 141, the court says:

> "But it is not to be forgotten ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it."

See also:

Cox vs. United States, 9 Wall. 298;

Sloan vs. United States, 95 Fed. 194.

The foregoing cases from this court sustain the principle contended for by plaintiff in error that even though the statute requires construction by the officer whose duty may be defined threin this does not necessarily make the duty of the officer anything other than a ministerial one. Necessarily there is the exercise of intelligence in every act of an official administering or applying the law. You cannot put the facts and the statute and the official duty into a machine and grind out the product. They have to pass through a human mind and that

mind has to apply the law to the facts in performance of the duty, but that does not justify the mind of the officer in changing the law and applying the facts to what is essentially a different law. That is to be arbitrary. That is to be lawless. We maintain, therefore, that the Secretary has essentially altered the law by converting the essential terms of it, upon which our rights are based, to terms of another meaning, and that that is an arbitrary act which the courts can control and overrule. If the courts cannot do this then the department officers each in his several sphere, are absolutely autocratic.

Counsel for defendants in error below have relied upon the cases of

United States ex rel Ness, vs. Fisher, 223 U. S. 683;

Riverside Oil Co. vs. Hitchcock, 190 U. S. 316.

In the first of these cases it was held that the decision of the Secretary of the Interior was not arbitrary nor capricious so as to be controllable by mandamus *where the view taken by him has long prevailed in the Land Department and been approved by the courts.* Thus in the *Ness* case the Department was following its long settled construction of the law.

In the case at bar this is the very thing we are asking the Secretary to do.

In the *Riverside* case, *supra,* it was sought to control the Secretary's construction of a public land statute. In the case at bar we are seeking to compel the Secretary to apply his own settled construction and to prevent the destruction of our vested rights by retroactive regulations.

The statements in these decisions as to mandamus are general in their character and have no application to the facts here.

In their brief in the court below the defendants in error state:

> "The rule, of course, is that as long as title is in the United States the courts will not interfere with the Secretary of the Interior, however much, after title has passed, they may in a collateral proceeding correct his errors."

Counsel cannot well claim this to be the rule in view of the *Hoglund* case, *supra.*

Counsel refer in their brief to the case of *Daniels vs. Wagner,* 237 U. S. 547, and in discussing that case say:

> "The Secretary has discretion to interpret any act such as the act of 1904, that he is called upon to administer. That discretion may not

be interfered with in a direct proceeding, but if he has erred in matter of law the courts, after title has passed, may correct the error and adjudge the injured party to be entitled to possession, just as the Supreme Court did in the *Daniels* case."

If this were true it would be a most unhappy state of the law. We would have the spectacle of a citizen whose rights have been denied by the Secretary of the Interior as a result of a mistaken interpretation or a wilfull misinterpretation of the law, absolutely without remedy unless, perchance, the Secretary should further violate his duty and erroneously transfer the rights of our unfortunate citizen to a third person. We do not believe this is the law, and this court has held otherwise in the *Hoglund* case, *supra*. That this court will not permit a citizen thus situated to be without remedy was held in *United States vs. Schutz, supra*, where a writ of mandamus against the Secretary of the Interior was ordered issued, the court saying:

> "If the relator in this case cannot obtain his patent, he is wholly without remedy. He cannot sue the United States in whom is the title in the absence of the patent; for the United States can be sued in no other court than the Court of Claims, and we have decided that the court has no jurisdiction in such a case."

Counsel for defendants in error further stated in the court below as follows:

> "Moreover the nature of the relief asked makes this substantially a suit against the United States. That is, if the Secretary is ordered to issue a patent, the United States is to lose land to which the Secretary as the disposing agent of the Government has determined that the appellant is without title under the Act of 1904. The Secretary has no title to the land. The legal title is in the United States. The effect of the judgment would convey title out of the United States in a proceeding had behind its back."

Again counsel is in error. Upon no theory is this a suit against the United States. The United States as such cannot be sued. The plaintiff in error herein has complied with the statute and has a vested right to the land involved, which in equity belongs to it. This proceeding is to compel the Secretary of the Interior to perform his legal duty by furnishing to the plaintiff in error evidence of its title. In any event this contention is fully answered by the holding in the *Hoglund* case, *supra,* which holding also disposes of the case of *Goldberg vs. Daniels,* 231 U. S. 218, cited and relied upon by defendants in error in the court below. In the *Goldberg* case the relator sought by mandamus to compel the Secretary of the Navy to enter into a contract with him and to make a sale to him of personal property belonging to the United States. In that case the relator had no vested rights and the case has no application to the case at bar.

In view of the foregoing it appears that the judgment of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA on the relation of ALASKA SMOKELESS COAL COMPANY, plaintiff in error,
v.
FRANKLIN K. LANE, as Secretary of the Interior, and CLAY TALLMAN, as Commissioner of the General Land Office.
No. 36.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The writ of error (R. 48) is brought to review a judgment of the Court of Appeals of the District of Columbia (R. 44) which affirmed a judgment of the Supreme Court of the District (R. 40) dismissing the petition of the Alaska Smokeless Coal Company (R. 1) for a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent for seven tracts of public coal land in the Territory of Alaska.

Opinions: Supreme Court, R. 34; Court of Appeals, R. 43.

The coal company applied for the patent in 1909 under the acts of April 28, 1904 (33 Stat. 525), and May 28, 1908 (35 Stat. 424), and its right thereto depended upon its ability to show to the satisfaction of the Land Department that, prior to November 12, 1906, it had "opened or improved a coal mine" on each of the tracts. On this question hearings were held, and the register and receiver of the local land office (R. 9), the Commissioner of the General Land Office (R. 15), and the Secretary of the Interior (R. 21) successively decided against the company and denied its application. In the Secretary's decision, where the evidence is reviewed at length, it appears that the utmost claim of total expenditures on the land, apart from surveying, was "two hundred and fifty dollars in improvements * * * on five claims." (R. 23.) The Secretary found that "the workings upon the claims consisted of mere surface openings;" that the locators, "at all times after the dates of their respective locations, had in active contemplation a sale of the property," and that "the work was performed without any reference to active mining operations and for prospecting purposes pure and simple." (R. 24.) He therefore concluded (R. 27):

> It appearing from the record in the case, as above stated, that the work performed upon the claims here in question consists only of shallow surface cuts and openings made merely for prospecting purposes and not for the purpose of the opening or improving of a pro-

ducing coal mine or mines, it must be held that none of the asserted locations included in the application affords a sufficient basis for entry and patent under the coal land laws.

JURISDICTION OF THE COURT.

Before discussing the questions raised by the plaintiff in error in this case, the defendants in error insist that this court should decline to entertain them, because said case is not one wherein a writ of error or an appeal lies to the judgment of the Court of Appeals of the District of Columbia. The plaintiff in error is proceeding under Judicial Code, § 250, Subdivisions Fifth and Sixth, which read as follows:

> Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

It is insisted that this case is not one "in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question," nor one "in which the construction of any law of the United States is drawn in question by the defendant." The case is one where in the exercise of an admitted authority, invoked by the plaintiff in error, to grant or refuse a patent to coal land, the Secretary of the Interior held that the facts did not

show that the locators or claimants had opened or improved a mine or mines of coal. It is not claimed that the statute does not so provide; but the contest is wholly on the judgment of the Secretary of the Interior on the evidence as to whether such work had been done.

Clearly the case does not come within the sixth paragraph, for the record plainly shows that no question was raised by the defendants, the Secretary of the Interior and the Commissioner of the General Land Office, as to the construction of any law of Congress. The answer to the petition for mandamus (R. 31–32) negatives any such claim. All that the answer set forth was that the proceedings had in the Land Department were in accordance with law and pursuant to the jurisdiction vested in the department, and the decision rendered was the result of the exercise of the discretion vested in the Secretary of the Interior and his subordinates. It is the plaintiff in error, and not the defendants in error, who draws into question the construction of the particular law applicable to the case and who claims the construction placed upon that act by the Land Department to be erroneous. That is the basis of its petition for mandamus. There can not be any question that this case is not within the purview of the sixth paragraph of section 250. *United States ex rel. Jones* v. *Fisher*, 38 D. C. App. 46, 53 (certiorari denied, 225 U. S. 708); *United States ex rel. Moser* v. *Myer*, 39 D. C. App. 370, 371.

It is equally clear that the case is not within the fifth paragraph.

The basis of the petition for mandamus was, as set out in paragraph XVI (R. 29), that the Secretary of the Interior and his subordinates, in their decisions on the proceedings before that department, "have erred, not in the facts, but in their interpretation * * * of the law."

The plaintiff in error did not challenge the competency of the Land Department to conduct the inquiry into the validity of the coal claims sought to be acquired under the application for patent. It could not seriously have done so. Admitting as it did the power to hear and determine the validity of the application for patent, it consequently admitted the power of the department to enter judgment.

The position of the plaintiff in error is this: It asserts that upon the evidence adduced, the Secretary of the Interior should have found in favor of the validity of the application and should have caused a patent to issue. Its complaint is of his failure to do so, and of his finding against the validity of the application and his action in rejecting it. Certainly there is no question raised as to the existence or scope of the power or duty of an officer of the United States—here, the Secretary of the Interior.

Neither is the validity of any authority exercised under the United States drawn in question. There is no attack upon the *validity* of the power; merely a complaint of the effect of its exercise upon the plaintiff in error.

Even were the challenge directed to the power of the Secretary to hear and determine, that would not draw in question an authority exercised under the United States; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162, 166.

This case comes fully within the holding of this court in *United States ex rel. Champion Lumber Co.* v. *Fisher*, 227 U. S. 445. That case was stronger than the instant one, for there was a challenge of the power of the Land Department to entertain a proceeding against the validity of an entry under the homestead laws. It was asserted that by reason of the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095, 1098), the petitioner was entitled to have a patent issued upon the entry since there was no protest or contest pending in the Land Department against the entry at the expiration of two years from the issuance of final receipt thereon. The Land Department held that under certain stated facts there was a protest pending, which took the case out of the proviso of the act referred to. In dismissing the petition for a writ of error to the Court of Appeals for the District of Columbia, this court said (p. 451):

> In clause five of section 250, under consideration, the added ground of appeal is given if the existence or scope of any power or duty of an officer of the United States is drawn in question. Within the meaning of this statute, was any such validity or existence or scope of authority drawn in question? It appears that

the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon this allegation, and the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which make the case appealable to this court under the fifth clause of section 250 of the Judicial Code.

The case of *Taylor* v. *Taft*, 203 U. S. 461, is also in point on the question here presented. In that case a mandamus was sought to compel the Secretary of War to reinstate a discharged employe on the ground that her dismissal was in violation of the civil-service rules. Upon a motion to dismiss, the court held the case not properly reviewable under the writ of error. It was said (p. 464):

> As Mr. Justice Gray said, in *South Carolina* v. *Seymour*, 153 U. S. 353, referring to an identical provision of the laws of the District prior to the code: "In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question."
>
> And, prior to that case, we had disposed of the same question in *United States* v. *Lynch*, 137 U. S. 280. That was a petition for a writ of mandamus against the Fourth Auditor and the Second Comptroller of the Treasury, to compel them to audit the account of petitioner, who was an officer in the Navy. It was insisted that by the disallowance of petitioner's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. We held otherwise, and said:
>
> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of

an authority every time an act done by such authority is disputed. * * *

"What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the auditor to audit the account, and in the comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority."

In the case at bar the question raised by the plaintiff in error was the correctness of the construction of the applicable law by the land department. The answer of defendants in error put in issue the question of the right of the courts to review in a mandamus proceeding a decision of executive officers, the result of the exercise of a discretion within their vested jurisdiction. The case was decided upon that point. What the plaintiff in error really sought was the coercion by the court of the judgment and discretion of the Secretary of the Interior and his subordinates. That the courts will not entertain such an action is well settled. The writ of mandamus can not be used as a substitute for a writ of error. *Ness* v. *Fisher*, 223 U. S. 683, 694.

It follows that this court is without jurisdiction to review the judgment of the court below, made

final under section 250 of the Code, and that the writ of error should be dismissed.

PROPOSITIONS.

1. The decision of the Land Department was right.

2. Whether right or wrong, the decision of the Land Department was made in the exercise of judgment and discretion and can not be controlled by mandamus.

ARGUMENT.

I.

THE DECISION OF THE LAND DEPARTMENT WAS RIGHT.

Section 1 of the act of April 28, 1904 (ch. 1772, 33 Stat. 525), under which plaintiff in error claims the rights invoked in this action, provides:

> That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in

the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Section 2 of the same act provides:

SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until

> after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Section 1 of the act of May 28, 1908, authorizes the consolidation of claims. As the defendants in error do not question any claimed right asserted by plaintiff in error on account of the fact that the asserted claims were consolidated, this statute needs no further consideration.

The entire controversy under the proposition now being considered turns upon the language of section 1 of the act of 1904, which confers certain rights upon a person or an association of persons "who shall have opened or improved a coal mine or coal mines" on the public lands of Alaska.

Plaintiff in error contends that its grantors "opened or improved a coal mine or coal mines on each of their respective locations under the coal land laws as the same then existed, and under the then settled construction of those laws." (Br. p. 18.) It is impliedly, if not explicitly, admitted by counsel for plaintiff in error that the grantors of plaintiff in error did not "open or improve a coal mine or coal mines," as those words of the statute have been construed in later land decisions, but in this connection they insist that the rights of plaintiff in error should not be determined under rules laid down in such later decisions but the same should be determined by what they assert to

be the more liberal rules adopted in the earlier decisions of the land department.

We think there is no such distinction between the earlier and the later decisions as that claimed by counsel for plaintiff in error, and, therefore, that there is no occasion for the application of the rule of *stare decisis*. It is true that in certain of the earlier decisions cited by plaintiff in error there is language which colorably supports the contention that mere prospecting work resulting in a discovery of coal in the land is all that is necessary. However, only a cursory reading of those cases is required to see that such language was either unnecessary to the decision or is not susceptible of the construction given to it by opposing counsel.

The cases cited and relied upon by plaintiff in error in this connection are *Watkins* v. *Garner*, 18 L. D. 414; *Paire* v. *Markham*, 21 L. D. 197, and *Reed* v. *Nelson*, 29 L. D. 615.

> *The decisions in these cases do not support the contention made in behalf of plaintiff in error as to what constitutes the opening or improvement of a coal mine.*

Obviously, the whole contention of plaintiff in error must fail if the above statement is correct. Unless these early decisions clearly establish a standard with respect to what shall constitute the *opening or improvement* of a coal mine, and unless such standard when applied to the facts in the instant case preclude the conclusion reached by defendants in error as to what constitutes the "open-

ing or improvement of a mine," there is no occasion for the application of the doctrine of *stare decisis*.

The real issue in the *Garner* case was whether or not Garner had manifested "continued good faith" as required by Revised Statutes, section 2351, which provides that when conflicting claims arise over "coal-lands where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement followed by proper filing and *continued good faith* shall determine the preference right to purchase." The opinion recited that Garner "testified that from *February 6, 1888*, till he offered to prove up, he either worked himself on the tract or hired others to work for him, that he expended $400 in labor and improvements, that he opened several drifts on each half of the land." * * * As the contestants' filings were made, respectively, *August 9, 1888*, and *January 30, 1889*, it is inferable that a substantial part of the sum of $400 was expended in "opening or improving" the mine before the contestants attempted to acquire the land. In any event, it is plain that the opinion does not lay down any rule with respect to what shall constitute the "opening and improving of a mine," as required by section 2348. It simply holds that under the facts of that particular case Garner had proven possession, improvement, and good faith under section 2351.

The decision in *Paire* v. *Markham, supra*, likewise furnishes no standard as to what shall constitute the "opening or improvement of a mine" as there is

nothing to show how much work was done by Markham, whose claim was upheld, except the meager statement that it was not an extensive working. As to what would constitute an extensive working does not appear. It does clearly appear in the opinion, however, that the work must be of such a character as to "*clearly indicate the good faith of the claimant* and not as a mere matter of form"; thus making it necessary in all contests of this character for the department officials, not only to determine the quantum of work performed, but also to determine as a question of fact whether under the circumstances the work done *clearly* indicates the exercise of good faith.

Likewise in *Reed* v. *Nelson*, *supra*, the Secretary was not called upon to determine what would constitute the opening or improvement of a mine. Neither party to the contest could claim any advantage over the other on the score of the amount and character of the work done, and no reference is made to the statutory requirements with regard to the opening or improvement of a mine. Aside from the question as to the effect of giving an option to purchase an assignment of a coal claim, the only question decided or presented for decision was whether a right could be initiated by the mere filing of a declaratory statement. It was held that no right could be so initiated but that "the right to purchase coal lands is initiated by the actual discovery of coal on the land *and* the performance of some act of improvement

sufficient to give notice to the world of an intent to purchase such lands as coal lands." 29 L. D. 618. Thus it again appears that even as between private claimants, and where the Government is asserting no claim, it is essential not only to perform the work which is incident to the making of a discovery, but there must be such improvement work performed as would disclose a *bona fide* intent to purchase the lands as coal lands. This presents a question of fact which calls for the exercise, in each instance, of the judgment and discretion of the proper tribunals of the Land Department.

It must be presumed that all of these decisions were intended to be in harmony with the department rule promulgated July 31, 1882 (1 L. D. 687), which provides:

> 18. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

The mere statement of the position assumed by opposing counsel with respect to what constitutes the opening or improvement of a coal mine is all that is necessary to show how irreconcilable that position is with the statutes, rules, and decisions we have been considering. Their contention, as stated in their brief (p. 36) is as follows:

> We contend that the correct interpretation of the term "*open* AND *improve any coal mine or mines*" as used in section 2348 of the Re-

> vised Statutes, and the term "*opened* OR *improved a coal mine or coal mines*" as used in the act of April 28, 1904, and as construed by the Department at and prior to the time these claims were initiated, was the actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal, which is the coal mine.

They ignore all of the requirements of the applicable statutes, rules and decisions relating to the good faith or *bona fide* intent of claimants. No decision, early or late, has been cited by them which supports their proposition that "an actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal" constitutes *ipso facto* the opening or improving of a coal mine within the meaning of the act of 1904 under which they assert their claims.

In the case of *Alaska Petroleum and Coal Company*, on rehearing (45 L. D. 65), the same contention was made with respect to the earlier land decisions as is made here. After a lengthy review of the cases referred to above, as well as numerous other land cases, the Secretary of the Interior overruled the appellant's contention, saying (p. 75):

> By reason of the foregoing the department is not persuaded by the presentation of counsel that the early decisions established the rule and practice that discovery of coal, only accompanied by such development as would indicate good faith on the part of the claimant, was sufficient to satisfy the requirements of the law with respect to the opening and improving

> of a mine of coal as the basis for a preference right. Neither is it convinced that such early holdings or rulings were so uniform and well established as to crystallize into and become a binding rule of property which would serve to fix substantial rights in the locators of the claims involved in the case at bar.

Plaintiff in error takes exception to a statement contained in the decision rendered by the register and receiver in which it is said (Br., p. 49):

> There is not, then, such a common statutory intent expressed in the general law and the Act of 1904 as will permit an adjudication under the rule of stare decisis even if it be conclusively shown that the qualification formerly defined is not what is now sought to be exacted of the locator. (Transcript of record, p. 13.)

Right or wrong, the statement is innocuous, as it is unnecessary to the decision rendered and was not adopted or relied upon as a ground of decision by either of the defendants in error, and therefore may be disregarded.

The grantors of plaintiff in error did not open or improve either of the coal claims involved in this action as required by the provisions of section 1 of the act of April 28, 1904.

The adverse proceeding in this case was instituted by the Land Department subsequent to the withdrawal order of November 12, 1906, in which all coa lands in Alaska were withdrawn from sale. By Executive order made January 15, 1907, all rights

acquired in good faith prior to withdrawal were preserved. The proceeding so instituted by the Land Department challenged the claims asserted by plaintiff in error on the ground, *inter alia*, that neither plaintiff in error nor its grantors had "opened or improved any coal mine or coal mines" on the lands in question as required by the Act of April 28, 1904 (33 Stat. 525.) Inasmuch as it is conceded by opposing counsel that the later land decisions are against their contention, it will not be necessary to review these decisions at great length. Among them are the following:

Rose v. *Dinneen*, 26 L. D. 107;
Charles S. Morrison, 36 L. D. 126;
Esther F. Filer, 36 L. D. 360;
Thad Stevens et al., 37 L. D. 723;
Andrew L. Scofield et al., 41 L. D. 176;
John L. Long, 43 L. D. 305;
Alaska Pet. & Coal Co., 45 L. D. 56; Rehearing, p. 65.

Illustrative of the holdings in these cases, the opinion in the *Charles S. Morrison* case, *supra*, contains the following expression (p. 128):

> Under the provisions of the law the preference right of entry arises only when a duly qualified person or persons open and improve a mine or mines of coal upon the public lands and are in actual possession of the same. Apart from the matter of qualification under the statute, three elements must concur in point of time to give rise to the preference right, viz, the opening of a mine of coal, its improvement as such, and actual possession.

In the *Esther F. Filer* case, *supra*, it was said (p. 861):

> Whatever else may be involved, the statute clearly contemplates the actual opening of a mine of coal and its improvement as such.—Charles S. Morrison. (36 L. D. 126, 129.) Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine are essential. What specific work or workings constitute the opening of a mine, or what accomplishes the improvement of a mine when opened, are matters as to which no arbitrary and inflexible rule can be laid down. Each case as it arises must be determined upon the facts disclosed.
>
> * * * Can it well be said that merely "cleaning out old coal prospects" at an expense of $10 is sufficient under the circumstances of this case? Whereby does such work alone, in any substantial manner and under any reasonable view, constitute the actual opening and improving of a mine of coal? * * * The showing is clearly to the effect that the claimant has endeavored to utilize principally old workings upon the ground. * * * The record fails to show that the applicant, at the time her declaratory statement was filed, was invested with a preference right of entry as contemplated by the coal-land laws.

In the *Thad Stevens* case, *supra*, the requirements of a good entry were stated to be as follows (p. 725):

> The provision of section 2348, Revised Statutes, * * * is deemed to have been intended to set a premium upon, or reward in that manner, the opening up of such lands for

> the potential production of coal therefrom. A bore hole of such diameter as was relied upon in that case would serve no such purpose, obviously, and would but serve affirmatively to demonstrate the presence of the coal, the existence of which must be proven in some appropriate manner in any case, whether the application to purchase and enter be in the exercise of a preference right or otherwise.

The *Scofield* case, *supra*, arose under the act of April 28, 1904, and it was held (p. 177):

> A small amount of open-cut work, merely for prospecting purposes, does not meet the requirements of the coal land laws conferring a preference right of purchase upon one who opens and improves a coal mine upon the public domain.

The requirements of the coal land laws with reference to the "opening or improvement" of claims were evidently imported from the general mining laws relating to annual assessment work. It may be helpful, therefore, to ascertain what the courts have held with respect to that class of work:

In *Smelting Co.* v. *Kemp*, 104 U. S. 636, this court said of assessment work (p. 655):

> Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements

> may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water or where the improvement consists in the construction of a flume to carry off the débris or waste material.

In *Jackson* v. *Roby*, 109 U. S. 440, the court said, in speaking of the local rules of miners (p. 441):

> * * *. They all agreed in one particular, in recognizing discovery and appropriation as the source of title, and development by working as the condition of continued possession. The first discoverer could derive no benefit from his discovery unless he followed it up by work for the development of his claim; * * *.

The same principle was reiterated in *Erhardt* v. *Boaro*, 113 U. S. 527, where, at page 535, it was said:

> In all legislation, whether of Congress or of the State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership, until a patent is obtained.

An interesting discussion of what constitutes work sufficient and available occurs in *Bishop* v. *Baisley*, 28 Oregon, 119, wherein it was said (pp. 135, 136):

> But it is insisted that whatever labor is performed for the purpose of prospecting a mine, fills the requirements of the statute,

> and in support of this position counsel cites *United States* v. *Iron Silver Mining Company*, 24 Fed. 568, and *Book* v. *Justice Mining Company*, 58 Fed. 107. * * * The word "prospecting," when used with reference to annual labor to be expended upon a mining claim, is incapable of so broad a signification as is claimed for it. It is not used in the sense of "exploration and discovery," which is necessary before a valid location can be made, but rather in the sense of "development and demonstration," that the value of the ledge may be determined, as distinguished from the ascertainment of its existence.

It is plain that no hard and fast rule is deducible from the adjudicated cases as to what constitutes the opening or improving of a mine. It is conceivable that in a given case the work done, the discovery made, the continued possession, and the good faith of the claimant might so clearly appear that no question of fact would remain for consideration, but that is not the situation in this case. There was a slight conflict in the evidence, but considering it in the aspect most favorable to plaintiff in error the work done amounted at most to mere prospecting cuts and surface openings. In the notices of location on five of the claims the amount expended in labor and improvements was stated to be $10.50. On the two other claims no statement was made concerning the amount expended. (R. 22–23.)

In the application to purchase, which was subscribed and sworn to May 21, 1909, the statement is made that the amount expended in connection

with all of the claims in "developing and opening coal veins" is $244.94. (R. 23.) Other evidence adduced is summarized by the First Assistant Secretary at pages 23–24 of the record, as follows:

> The evidence adduced at the hearing shows that the initial work relied upon by applicants as the basis of six of these purported locations was performed by Asbjornson assisted by Dahlgren and Bredenberg. This consisted in going upon the ground in 1904, performing some work upon some of the claims in the shape of digging with a pick and staking the claim. It seems that about four days were spent in the performance of this work. Thereafter and during the same year, Asbjornson, in company with one Beck, went upon the land and spent about ten days prospecting for coal. During this period also Asbjornson appears to have made the location No. 8 which was made in Swanson's name. Nothing else appears from the evidence to have been done upon the land until 1908, when, according to the testimony of Asbjornson, he and Bredenberg again went thereon and spent about two weeks prospecting. It was during this period evidently the Holck's claim, the No. 7, was located. It is testified on behalf of the claimants by said Thomas P. McDonald that in 1906 he made an examination of the area included in the group of claims applied for and found nothing thereon in the shape of mining improvements save a number of open cuts, many of which were of small dimensions but some from fifteen to twenty feet in length;

that none of said openings appeared to be more than three or four feet in width. The testimony of other witnesses for the applicant is to the effect that as late as 1911 the workings upon the claims consisted of mere surface openings. None of these openings, so far as shown, was made with the view to the actual mining of coal therefrom on any of the claims, but, on the contrary, all seem to have been made solely for prospecting or exploiting purposes and to determine the extent and character of the coal underlying the area. The evidence further shows that none of the locators had had any experience in coal mining and that with the possible exception of Swanson, none was financially able to equip or open and operate a mine, or even to pay for the land included in his location, but that all of them at all times after the dates of their respective locations had in active contemplation a sale of the property, although some testify, vaguely and indefinitely, to an intent to mine and dispose of coal from their respective claims, if possible, in the event they should be unsuccessful in their efforts to sell their claims. The testimony, as a whole, considered in the light of the allegations contained in the location notices filed in the local office, and the averments made in the company's application to purchase and affidavits filed to support the same, clearly shows that the work was performed without any reference to active mining operations and for prospecting purposes pure and simple.

Accordingly, this conclusion was reached:

> It appearing from the record in the case, as above stated, that the work performed upon the claims here in question, consists only of shallow surface cuts and openings made merely for prospecting purposes and not for the purpose of the opening or improving of a producing coal mine or mines, it must be held that none of the asserted locations included in the application affords a sufficient basis for entry and patent under the coal land laws. (R. 27.)

All of the evidence was considered first by the register and receiver, then by the Commissioner of the General Land Office, and lastly by the First Assistant Secretary of the Interior. It was incumbent upon them to determine not only the amount and character of the work done, but also to determine whether the work was done in good faith with the intent of opening or improving a mine or mines or for mere prospecting and exploitation purposes. They all decided that it was for the latter purposes and in doing so performed a function peculiarly within their jurisdiction.

II.

WHETHER RIGHT OR WRONG, THE DECISION OF THE LAND DEPARTMENT WAS MADE IN THE EXERCISE OF JUDGMENT AND DISCRETION AND CAN NOT BE CONTROLLED BY MANDAMUS.

That executive officers of the Government, in the exercise of judgment and discretion concerning matters within their respective jurisdictions, are not subject to be controlled by the courts, has been so frequently decided as to be axiomatic.

It is conceded, of course, that such officers may be required by judicial mandate to perform mere ministerial duties. Not so, however, when the duties to be performed call for the exercise of judgment and discretion. In the instant case there were questions both of law and of fact presented for the determination of the defendants in error. It was their duty to decide those questions and they did so. They decided that the language of the statute as to what constitutes the opening or improving of a mine meant something more than mere prospecting work or work done for the purpose of exploitation, and also that the statute so construed had not been complied with. They found that the claimants had not shown the requisite good faith and *bona fide* intent in the premises. Let it be admitted that they erred in this, and that a court, if the questions were submitted to it as an original proposition or on appeal, would find differently; it does not follow by any means that the action of the defendants in error is subject to review in a mandamus proceeding or that they can be compelled to give effect to the contrary judgment of another tribunal. The Land Department under the supervision of the Secretary of the Interior constitutes a special tribunal with *quasi* judicial functions, and the decisions of that department involving questions of law as well as questions of fact, unless made arbitrarily or capriciously, are not subject to review by mandamus.

In *Ness* v. *Fisher*, 223 U. S. 683, mandamus was sought to compel the Secretary of the Interior to ac-

cept an application to purchase certain lands under the stone and timber act of June 3, 1878 (20 Stat. 89, c. 151). The Secretary had held that the statement of the applicant had to be made from the personal knowledge of the applicant and not on information and belief. This ruling involved the construction of section 2 of the act. This court held that since the decision of the Secretary involved the exercise of judgment and discretion it was unimportant whether the decision was right or wrong. It could not be reviewed by mandamus. In the opinion delivered by Mr. Justice Van Devanter the point under discussion was disposed of in the following language (p. 691):

> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. *Decatur* v. *Paulding*, 14 Pet. 497, 515; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324.

The rule in the *Ness* case was followed in *Knight* v. *Lane*, 228 U. S. 6.

In the case of *Lane* v. *Hoglund*, 244 U. S. 174, which is cited and relied upon by opposing counsel, there was no statutory language of doubtful meaning to be interpreted, and no inferences from proven facts to be drawn. The statute there under consideration provided (p. 175):

> That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

The case turned on the meaning of the words "pending contest or protest." It was claimed on the one hand that a mere report of a deputy forest supervisor submitted to the General Land Office recommending cancellation of the entry constituted a "pending contest or protest" within the meaning of the statute. This was submitted within the two-year period, but no action was taken thereon until after the expiration of that period, when the Commissioner of the General Land Office instituted a contest to determine whether the entryman had

established and maintained a residence upon the land. It was held (p. 178) that:

> Independently of the occasion for the enactment and of the practice of the Land Department, there hardly could be any difference of opinion about the answer. And when these are understood we think there is no room whatever for a difference; in short, the reference is to a proceeding against the entry and not to some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one.

In effect this court decided that there was no statutory language of doubtful meaning to be construed and no questions of fact to be resolved, and therefore the action of the Land Department involved no element of discretion. We do not doubt that mandamus will lie in such a case.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

ALEX. C. KING,
Solicitor General.

FRANK K. NEBEKER,
Assistant Attorney General.

October, 1919.

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UNITED STATES ON THE RELATION OF ALASKA SMOKELESS COAL COMPANY *v.* LANE, SECRETARY OF THE INTERIOR, ET AL.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 36. Argued October 14, 1919.—Decided November 10, 1919.

The Act of April 28, 1904, § 1, c. 1772, 33 Stat. 525, provided that the locator of unsurveyed coal land in Alaska "shall have opened or improved a coal mine;" upon an application for patent the Secretary of the Interior construed this as requiring that the work done evince a purpose to open or improve a producing mine; and, examining the undisputed facts as to the work relied on, which consisted of more or less superficial excavations exposing coal, found that it was done for prospecting purposes and that it did not satisfy the statute. *Held*, not arbitrary even if erroneous; and not subject to revision by mandamus. P. 552.

Held, further, that the Secretary's discretion in the matter was not foreclosed by rulings in earlier cases, as to what constitutes the opening or improvement of a mine, said to have been relied on in the making of the locations, but the effect of which is found not to be inconsistent with the decision complained of. P. 553.

46 App. D. C. 443, affirmed.

THE case is stated in the opinion.

Mr. Dean Burkheimer, with whom *Mr. Charles E. Shepard*, *Mr. James R. Caton*, *Mr. Stanton C. Peelle* and *Mr. C. F. R. Ogilby* were on the brief, for plaintiff in error.

Mr. Assistant Attorney General Nebeker, with whom *The Solicitor General* was on the brief, for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition for mandamus to require the Secretary of the Interior and the Commissioner of the General Land Office

to approve and pass to patent the application of the petitioner for certain coal claims, or to show cause why they have not done so.

Respondents replied that they are constituted by law the sole agents of the Government in the administration and disposal of the public lands by and through the means appointed by Congress and have exclusive jurisdiction to determine the validity of all claims or applications to enter or acquire any part of them, and that the discharge of that duty involves judgment and discretion.

And further replied that petitioner sought to acquire title to the coal claims under the Act of April 28, 1904, c. 1772, 33 Stat. 525, and the Act of May 28, 1908, c. 211, 35 Stat. 424, by virtue of the locations set out in the petition. That the locations came on to be heard and that they, respondents, after considering all of the evidence and applying the law thereto, found and determined that the locations involved were invalid, the locators not having opened or improved any mine or mines of coal on any of the tracts of land in controversy as required by the cited statutes, and that petitioner was not entitled to purchase the same, and thereupon respondents in the exercise of their discretion and judgment rejected the application.

Hence they prayed that the rule against them be discharged and the petition dismissed.

Petitioner demurred to the reply on the ground that it did not set forth any substantial or legal defense. The demurrer was overruled and petitioner electing to stand upon it, the rule to show cause was discharged and the petition dismissed. The judgment was affirmed by the Court of Appeals.

The question in the case, therefore, is direct, that is, the power of the Land Office under the cited statutes and the facts recited in the petition. This power, we may say at the outset, necessarily is something more than ministerial, the mere yielding to and registry of any demand,

and yet, on the other hand, not arbitrary, without statutory direction or regulation by settled rules and principles. In other words, the Land Office is like any other tribunal—its institution and purpose defining and measuring its power, the determining elements being those of fact and law, upon which necessarily judgment must be passed.

What are the elements of fact and of law in the present case? As set forth in the petition they are these:

Sections 2347 to 2352 of the Revised Statutes provide for the entry of vacant coal lands, 160 acres to an individual, 320 acres to an association, who have *opened and improved*, or shall "*open and improve*, [italics ours] any coal mine or mines upon the public lands" (§ 2348).

These sections were extended to Alaska by an act passed June 6, 1900, [c. 796, 31 Stat. 658] and the latter act was amended by the Act of April 28, 1904, *supra*, § 1 of which provides "That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have *opened or improved* [italics ours] a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated. . . . "

Section 2 of the act provides for the application for and issue of patent.

The Act of May 28, 1908, provides for the consolidation of claims and their inclusion in a single claim. It is otherwise of no importance.

It will be observed that the only substantial difference between the sections of the Revised Statutes and the act extending them to Alaska is that by the former the right of location is granted to one or those "who have opened *and* improved" a mine or mines, and by the latter the grant is to one or those "who shall have opened *or* improved" a mine or mines.

Petitioner in great volume asserts locations under the

Act of April 28, 1904, to which locations it has succeeded. The facts concerning them are not in dispute; but whether what was done constituted an opening or improvement of mines and constrained a decision other than that given by the Land Office, is in dispute.

Eight locations were made, all of which were conveyed by the asserted locators to petitioner in March, 1909. Surveys were made of the locations, which surveys were duly examined and filed in the proper land office in Alaska; and in 1909 petitioner paid to the Treasurer of the United States ten dollars for each acre surveyed, in the aggregate $9,905.74, and made application to the then Secretary of the Interior through the local land office for a patent, tendering due proof of the locations of each applicant. Notice was posted.

April 26, 1912, at the local land office (Juneau), under the direction of the Commissioner of the General Land Office, proceedings were instituted against the application of petitioner upon the ground, among others, that neither of the claimants prior to making the locations or at any time thereafter and prior to filing notice of the locations, opened or improved any mine or mines of coal on any of the tracts of land as required by the Act of April 28, 1904.

Proofs were taken upon the charges and the register and receiver sustained them and decided and recommended that the application for a patent be rejected.

Upon an appeal to the Commissioner the decision of the local officers was approved after a circumstantial review of the case; and again upon appeal from the Commissioner's decision, by the Secretary of the Interior.

All of the officers decided that the acts of Congress contemplated as a basis of a valid location the opening and developing of a producing mine of coal and that work performed upon a claim for prospecting purposes does not fulfill the requirement. And that such was the character of the work done upon the claims in question was the de-

duction of the officers. "Shallow surface cuts and openings" the work was denominated, and not made "for the purpose of the opening or improving of a producing coal mine or mines."

The characterization, purpose and effect thus ascribed to the work of the claimants are contested and it is insisted that the amount and effect of the work done constituted an opening and improving of mines and constrained an opposite conclusion and judgment from that of the Land Office, and it is insisted, indeed, that a contrary conclusion was constrained not only by the provisions of the statutes but by previous rulings of the department, under the assurance of which the locations were made and thereby acquired the quality of vested rights to be recognized by the issue of patent as a matter of course—an irresistible right, therefore, having legal remedy in mandamus. It is hence insisted that "the respondent [Secretary of the Interior] and his said subordinates have erred, not in the facts, but in their interpretation and construction of the acts of Congress and of the law pertaining to coal mines in or under public lands of the United States in Alaska, and to the rights of location, application and patent thereof by locators and their assigns . . . and thereby exceeding his and their powers and jurisdiction."

The contention is repeated in petitioner's brief in various ways and illustrations. Cases besides are cited with the assertion that in such situation there is no room for the exercise of "discretion" but that it is the imperative duty of the Secretary to issue a patent, the right to it having become vested.

Undoubtedly there may be cases in which rights had actually accrued and nothing remained to the Secretary but their recognition, and counsel have collected and urged such as they deem in point; [1] but the present case lacks

[1] *Cudney* v. *Flannery*, 1 L. D. 165; *M. K. & T. Ry.* v. *Buck* (L. D. unreported); *Miner* v. *Mariott*, 2 L. D. 709; *Milne* v. *Ellsworth*, 3 L. D.

their essential condition. The decision of the local land officers and that of the Commissioner and Secretary disprove the assumption that counsel make that there was only an interpretation and construction of the acts of Congress. On the contrary there was a painstaking consideration and review of the evidence and a determination of its probative strength, and the deduction was that what was done was for prospecting purposes merely and did not satisfy the requirements of the acts of Congress—a purpose to open or improve a mine or mines. And necessarily there is a difference in the purposes, a difference between a mere discovery or exposition of a vein of mineral and its development. Counsel's contention confounds the difference and insists that it is established by the rulings in prior cases in the department that a mine is opened or improved by an "actual excavation of the earth, whether by open cut or tunnel, so as to expose a vein of coal, which is the coal mine." And this, it is contended, has become a principle of decision and has the insistent quality of *stare decisis*—commanding a specific conclusion, superseding by its automatism any discretionary function in the land officers.

It is not necessary to review the cases. It is enough to say that they have not the inflexibility ascribed to them. And this can be illustrated. Counsel speak of exposition of a vein by a "cut or tunnel." How deep or extensive must either be to invoke the principle? And is the principle confined to such or is it applicable whatever the kind or extent of the work—by any disturbance of the surface or without any disturbance if the vein be above the sur-

213; *Henry W. Fuss*, 5 L. D. 167; *Oliver* v. *Thomas*, 5 L. D. 289; *Watts* v. *Forsyth*, 5 L. D. 624; *Williams* v. *Loew*, 12 L. D. 297; *James B. Weaver*, 35 L. D. 553; *Roy McDonald*, 36 L. D. 205; *Oliver* v. *Bates*, 36 L. D. 423; *Bertram C. Noble*, 43 L. D. 75; *Fisher* v. *Heirs of Rule*, 43 L. D. 217; *Silets Indian Lands*, 42 L. D. 244; *Rough Rider and other Lode Mining Claims*, 42 L. D. 584.

face? Manifestly judgment in all cases must be exercised —judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law.

In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, it was said that Congress has constituted the Land Department the administrator of the public lands and for the discharge of this duty invested it with judicial functions which are not subject to review by injunction or mandamus. This was repeated and applied in *Ness* v. *Fisher*, 223 U. S. 683.

Counsel contest the application of these cases and distinguish them from that at bar by the difference between ministerial and judicial action, and assert "that the Secretary has essentially altered the law by converting the essential terms of it, upon which our rights are based, to terms of another meaning, and that that is an arbitrary act which the courts can control and overrule." If the accusation were true the conclusion might follow; but the accusation is not true. We rest on this declaration. It would extend this opinion too much to trace through the ingenuity of counsel's reasoning in a very long brief and the citation and analysis of many cases the distinction they rely on, that is, the distinction between formal and discretionary action. Undoubtedly there is that distinction. *Lane* v. *Hoglund*, 244 U. S. 174. But where there is discretion, as we think there is in this case, even though its conclusion be disputable, it is impregnable to mandamus. *Riverside Oil Co.* v. *Hitchcock* and *Ness* v. *Fisher*, *supra*.

Judgment affirmed.